

# Uncovering Official Lawlessness in Ohio’s Criminal Court Debt Assessment and Collection: A Toolkit for Defenders

NIKKI TRAUTMAN BASZYNSKI\*

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\* Nikki Trautman Baszynski is Senior Advisor at The Justice Collaborative and former public defender. The author would like to thank Kathleen Evans and the members of the *Ohio State Law Journal* for the invitation to present at the 2020 Criminalizing Poverty Symposium, and Sam Weir, Madison Hill, and the staff editors of the journal for their excellent work preparing for publication. A debt of gratitude is also owed to those who have provided guidance and feedback on this Article and issue, including the participants of the Symposium workshop, Craig Jaquith, and the outstanding attorneys, clerks, and staff at the Office of the Ohio Public Defender.

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## I. INTRODUCTION

I wasn't looking for anything in particular when I skimmed the cost bill in my client's appellate record. It just happened to be the first page of the stack of papers the clerk handed to me. And I wasn't expecting anything in particular when I decided to follow up on the three \$124 charges for "certified copy of the docket entries."<sup>1</sup> I just knew that if I were charged \$372 for copies, I would want to know why. So, I felt I owed it to my client to get that answer for him, too.

This simple inquiry—why did my client get charged \$372 for three copies of the same docket—sparked a growing interest in court costs: their assessment, their use, and especially their legality. Exploring that interest ultimately led me to uncover a variety of practices throughout Ohio that ranged from unwitting to unreasonable to exploitive.

The tangible impact of these practices varied from client to client. In some cases, it meant the county had sought hundreds of dollars to which it was not legally entitled. In others, the contested amount was less than a few dollars. But regardless of the amount, if I found an error, I raised it.

Perhaps naively, I expected the system to share my concern about this obvious misuse and abuse of government power. But such a response was hard to come by when I began challenging the assessment of unlawful court costs. The more common reactions were irritation (with me), apathy (about the problem), and resistance (to fixing it). In one hearing where hundreds of dollars in unlawful costs were at issue, the judge repeatedly disparaged my decision to

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<sup>1</sup> State v. [redacted], [redacted]-Ohio-[redacted], [redacted] N.E.3d [redacted], ¶ 21 ([redacted]) (on file with the *Ohio State Law Journal*); Criminal Costs Listing at 1, State v. [redacted], [redacted] No. [redacted] ([redacted]). This Article focuses on the behaviors of government actors and the policies of criminal courts. To illustrate these behaviors and policies, the Article must necessarily rely on criminal cases. However, to avoid centering the crimes, case information without precedential value has been redacted. All cited and redacted cases have been accuracy checked by and are on file with the *Ohio State Law Journal*.

raise this issue of unauthorized costs.<sup>2</sup> The judge also repeatedly brought up the facts of my client's case and the nature of his crime.<sup>3</sup> The message was clear: my client had no right to complain about the government taking his money, even illegally, *because* he had been criminally convicted. I lodged my objection, reminding the court that costs were not considered a criminal punishment in Ohio and that even permissible ones should not be imposed to effectively increase the harshness of a defendant's sentence.<sup>4</sup> At the end of the hearing, the unauthorized costs were vacated.<sup>5</sup>

Nevertheless, the tone of that hearing stayed with me and reinforced existing concerns. What was the scope of unlawful conduct that could be visited upon my clients because the system deemed them "criminals"?<sup>6</sup> How many other unlawful government actions are given a pass simply because the recipient of the violation is a criminal defendant? How much of the apathy that exists in ensuring certain laws are followed is rooted in the fact that those laws protect criminal defendants? Does our ignoring of minor abuses pave the way to larger ones?

The legalized transfer of money from poor defendants to bloated court systems is well-documented and plainly egregious.<sup>7</sup> What this Article seeks to explore are those instances where government actors go beyond quite modest legal constraints to exact even more money from indigent defendants. It seeks to bring into court debt conversations those individuals with felony convictions

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<sup>2</sup> Video Recording of Hearing on the Remanded Issue of Court Costs, State v. [redacted], [redacted] No. [redacted] ([redacted]) (on file with the *Ohio State Law Journal*) (discussion at 19:30, 26:05, 29:10, 31:50).

<sup>3</sup> *Id.* (discussion at 7:50, 11:10, 15:10, 19:30, 21:00, 25:00, 26:25, 29:25, 33:00).

<sup>4</sup> *Id.* (discussion at 28:00).

<sup>5</sup> Journal Entry, State v. [redacted], [redacted] No. [redacted] ([redacted]) (on file with the *Ohio State Law Journal*); Video Recording of Hearing on the Remanded Issue of Court Costs, State v. [redacted], [redacted] No. [redacted] ([redacted]) (on file with the *Ohio State Law Journal*) (discussion at 36:25).

<sup>6</sup> See, e.g., NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 58, 62–65, 73–82 (2016) (discussing the practice and consequences of identifying defendants as blameworthy for their moral failings and therefore deserving of extrajudicial sanction).

<sup>7</sup> See, e.g., HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 1 (2014), [https://www.hrw.org/sites/default/files/reports/us0214\\_ForUpload\\_0.pdf](https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf) [<https://perma.cc/JH3B-AWCW>]; LAWYERS' COMM. FOR CIVIL RIGHTS OF THE S.F. BAY AREA ET AL., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 6, <https://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf> [<https://perma.cc/FZ7U-5ERG>]; MATTHEW MENENDEZ ET AL., BRENNAN CTR. FOR JUSTICE, THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES 5 (Nov. 2019), [https://www.brennancenter.org/sites/default/files/2020-07/2019\\_10\\_Fees%26Fines\\_Final.pdf](https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf) [<https://perma.cc/95XW-CVA2>]; Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014), <https://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons> [<https://perma.cc/E2EP-ZH9G>].

and those who are caged inside prisons—two groups that can often be absent in reform advocacy.<sup>8</sup> And most importantly, it seeks to encourage and equip defense attorneys to monitor, challenge, and correct these unlawful practices.

As defenders, we can hold a mirror up to the system. We can reveal that those who are charged with passing judgment on others may themselves be engaged or complicit in unlawful activity.<sup>9</sup> We can concretely show how integrating profit-making into criminal adjudication invites misuse and exploitation.<sup>10</sup> And we can add oversight to a system that currently has little.

## II. THE NEED FOR ADVOCACY

### *A. The Harm of Court Debt Is Significant, Disproportionate, and Systemic*

It is indisputable that court debt can be an oppressive financial burden.<sup>11</sup> Outstanding court debt pits itself against basic necessities like food and rent. It makes it harder to pay for childcare, medical care, or child support. It “reduces household wealth and reproduces poverty over time.”<sup>12</sup> The failure to pay court debt can result in the garnishing of wages, motor vehicle registration blocks, and high-interest collection agency referrals.<sup>13</sup> It routinely results in the extension

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<sup>8</sup> Because misdemeanor crimes are minor and so great in number, the connection between profit-making and municipal courts is clearer. *See* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 85, 115–17, 132–37 (2018).

<sup>9</sup> *See* VAN CLEVE, *supra* note 6, at 189.

<sup>10</sup> *See, e.g.*, AM. CIVIL LIBERTIES UNION, OFF THE RECORD: PROFITEERING AND MISCONDUCT IN OHIO’S MAYOR’S COURTS 7 (Apr. 2019), [https://www.acluohio.org/wp-content/uploads/2019/05/Report\\_OffTheRecordProfiteeringAndMisconductInOhiosMayorsCourts\\_FINAL\\_2019-0520.pdf](https://www.acluohio.org/wp-content/uploads/2019/05/Report_OffTheRecordProfiteeringAndMisconductInOhiosMayorsCourts_FINAL_2019-0520.pdf) [<https://perma.cc/A8JM-GQBC>]; Matt Sledge, *New Law Sends New Orleans Court Collections to City Instead, but Critics Unmoved*, NEW ORLEANS ADVOC. (June 28, 2020), [https://www.nola.com/news/courts/article\\_a134c092-b66b-11ea-809d-eb40fc4c629f.html](https://www.nola.com/news/courts/article_a134c092-b66b-11ea-809d-eb40fc4c629f.html) (on file with the *Ohio State Law Journal*).

<sup>11</sup> *See, e.g.*, KARIN D. MARTIN, SANDA SUSAN SMITH, & WENDY STILL, SHACKLED TO DEBT: CRIMINAL JUSTICE FINANCIAL OBLIGATIONS AND THE BARRIERS TO RE-ENTRY THEY CREATE, NEW THINKING IN COMMUNITY CORRECTIONS 9 (Jan. 2017), <https://www.ncjrs.gov/pdffiles1/nij/249976.pdf> [<https://perma.cc/Y3SN-7J3Y>]; Alexandra Shookhoff, Robert Constantino, & Evan Elkin, *The Unintended Sentence of Criminal Justice Debt*, 24 FED. SENT’G REP. 62, 63 (2011).

<sup>12</sup> Alexes Harris, Heather Evans, & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIOLOGY 1753, 1763 (2010).

<sup>13</sup> MARTIN ET AL., *supra* note 11, at 9; SUPREME COURT OF OHIO, COLLECTION OF COURT COSTS & FINES IN ADULT TRIAL COURTS (July 2020) [hereinafter COLLECTION OF COURT COSTS], <https://www.supremecourt.ohio.gov/Publications/JCS/finesCourtCosts.pdf> [<https://perma.cc/MV7G-9S3W>].

of probation terms, concretely tethering the person to their conviction and improperly prolonging the consequences thereof.<sup>14</sup>

In many instances, this excessive, persisting financial punishment is visited upon those with misdemeanor offenses—mostly minor behaviors the government has chosen to criminalize instead of mitigate.<sup>15</sup> But the weight of court debt is also routinely added to felony convictions. For those incarcerated in prisons on more serious offenses, the negative effects of fines and fees can be just as severe. It is important to name—and curtail—those harms, too.

David Braden is awaiting execution at Chillicothe Correctional Institution, and he cannot afford a pair of shoes. His 1999 sentence included a civil judgment of \$2[, ]127.50 to recoup the costs of his jury trial. Since then, the Franklin County Court of Common Pleas has been extracting money from his prison account in nickel-and-dime sums. Although he earns \$16 each month in state inmate pay, Franklin County’s attachment of his prison account keeps it at a perpetual \$25 ceiling. At the Chillicothe Correctional Institution commissary, the cheapest pair of shoes is \$27.95.<sup>16</sup>

David Braden’s court-debt dilemma is shared by many. It is rooted in both the assessment of court debt and the state’s efforts to collect it.

Every person incarcerated in an Ohio prison is entitled to keep \$25 in their prison accounts.<sup>17</sup> If the person owes court debt, any amount above that is sent to the county to which the debt is owed.<sup>18</sup> In practical terms, this means that an incarcerated person with outstanding court debt can never purchase anything that costs more than \$25. It meant Mr. Braden would never be able to afford a pair of shoes. It means that someone who needs a prayer robe, which costs \$40, will be unable to afford it.<sup>19</sup>

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<sup>14</sup>For some of the most egregious examples of this practice, see HUMAN RIGHTS WATCH, *supra* note 7, at 22.

<sup>15</sup>NATAPOFF, *supra* note 8, at 119.

<sup>16</sup>Brief of Amici Curiae Am. Civil Liberties Union of Ohio Found. and Am. Civil Liberties Found., in Support of Appellant David Braden at 1, *State v. Braden*, 158 Ohio St.3d 462, 2019-Ohio-4204, 145 N.E.3d 235 (Nos. 2017-1579/1609).

<sup>17</sup>OHIO ADMIN. CODE 5120-5-03(D) (2018) (“If withdrawals are authorized and if there are sufficient funds in the inmate’s account to satisfy the amount shown as due, as long as the account retains twenty-five dollars for inmate expenditures, the designee shall promptly cause a check to be issued payable to the clerk of the court or other appropriate authority issuing the order.”); Tracey Read, *Court Fines Now Collected from Prisoners’ Commissary Accounts*, NEWS-HERALD (Jan. 2, 2016), [https://www.news-herald.com/news/ohio/court-fines-now-collected-from-prisoners-commissary-accounts/article\\_880850a5-b776-5362-b965-8ff3748c22f1.html](https://www.news-herald.com/news/ohio/court-fines-now-collected-from-prisoners-commissary-accounts/article_880850a5-b776-5362-b965-8ff3748c22f1.html) [<https://perma.cc/S2XK-MFD3>].

<sup>18</sup>OHIO ADMIN. CODE 5120-5-03(D) (2018).

<sup>19</sup>OHIO DEP’T OF REHAB. & CORR., INMATE PERSONAL PROPERTY 7 (Dec. 2019), [https://drc.ohio.gov/Portals/0/DOC123019-12302019181917\\_1.pdf](https://drc.ohio.gov/Portals/0/DOC123019-12302019181917_1.pdf) [<https://perma.cc/E45V-CQJ9>].

Combining court debt with the \$25 ceiling means that family members and friends can only put nominal amounts of money on loved ones' "books" to provide assistance in paying for necessities.<sup>20</sup> It also means that they must more frequently pay the processing fee to do so.<sup>21</sup> Outstanding court debt can prevent a person from purchasing telephone minutes to speak to their parents, partners, or children; hygiene products to supplement the inadequate supply provided by the prison; or even medical care.<sup>22</sup> It can also prevent access to the courts due to an inability to pay for postage or filing fees.<sup>23</sup> In short, money matters inside prisons, just like it does outside of them. The lack of it can cause extreme hardship.

The harms caused by court debt are not equally distributed. Numerous studies have shown that the burden of court debt is imposed more heavily on Black communities than white ones.<sup>24</sup> Political science researchers Michael Sances and Hye Young You found that cities with larger Black populations rely more heavily on fines and fees to raise revenue.<sup>25</sup> Their research was preceded by the revelation—propelled forward by community protests and outrage—that St. Louis's surrounding municipalities had been bankrolling their city governments through fines and fees that were heavily levied against Black

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<sup>20</sup> If the money added exceeds the \$25 limit, the amount in excess will be transferred to the county instead of left in the account for use. *See* OHIO ADMIN. CODE 5120-5-03(E) (2018).

<sup>21</sup> Transaction fees range from \$3.00 to \$5.50 plus 3.5% of the transferred amount. OHIO DEP'T OF REHAB. & CORR., CONVENIENCE FEES (Oct. 2012), [https://drc.ohio.gov/Portals/0/Funds/inmate\\_funds\\_transactfee.pdf?ver=2016-08-26-151945-700](https://drc.ohio.gov/Portals/0/Funds/inmate_funds_transactfee.pdf?ver=2016-08-26-151945-700) [<https://perma.cc/SE85-N89X>].

<sup>22</sup> For those who receive less than \$12 a month in their prison account, hygiene products are provided weekly upon request. OHIO DEP'T OF REHAB. & CORR., INMATE CLOTHING ISSUE 3 (Jan. 2020), [https://drc.ohio.gov/Portals/0/Policies/DRC%20Policies/61-PRP-02%20\(Jan%202020\).pdf?ver=2020-01-07-111904-447](https://drc.ohio.gov/Portals/0/Policies/DRC%20Policies/61-PRP-02%20(Jan%202020).pdf?ver=2020-01-07-111904-447) [<https://perma.cc/9TBG-9PC9>]. But, if a person's prison account has exceeded \$12 at any point in the previous 30 days, no additional hygiene products are provided. *Id.* at 3. Instead, the person must purchase them with their own funds. *Id.*

<sup>23</sup> *See* Motion for Delayed Appeal at 2, *State v. Stoutamire*, No. 20-0376 (Ohio Mar. 16, 2020); Motion for Delayed Appeal at 2, *State v. Rogers*, No. 20-0258 (Ohio Feb. 18, 2020).

<sup>24</sup> *See* ALEXANDRA BASTIEN, POLICYLINK, ENDING THE DEBT TRAP: STRATEGIES TO STOP THE ABUSE OF COURT-IMPOSED FINES AND FEES 2 (Mar. 2017), <https://www.policylink.org/sites/default/files/ending-the-debt-trap-03-28-17.pdf> [<https://perma.cc/E7YW-7ZFQ>]; U.S. COMM'N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS 3 (Sept. 2017), [https://www.usccr.gov/pubs/2017/Statutory\\_Enforcement\\_Report2017.pdf](https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf) [<https://perma.cc/9RAN-DW55>]; Michael W. Sances and Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POLITICS 1090, 1090 (2017).

<sup>25</sup> Sances & You, *supra* note 24, at 1090; German Lopez, *Study: Cities Rely More on Fines for Revenue if They Have More Black Residents*, VOX (July 7, 2017), <https://www.vox.com/identities/2017/7/7/15929196/police-fines-study-racism> (on file with the *Ohio State Law Journal*).

residents.<sup>26</sup> A later report from the Department of Justice examined the issue and denounced the practices.<sup>27</sup> Racial disparities in policing and demonstrably disproportionate prosecution rates also perpetuate racial disparities in court debt.<sup>28</sup>

Finally, the very concept of court debt—that the costs of court proceedings should be borne by those who are subject to them—invites misuse.<sup>29</sup> Each case represents an opportunity for revenue generation. Jurisdictions seeking to bolster tax revenue often simply need to increase fees, citations, and prosecutions.<sup>30</sup> Profit-making subverts the purported goals of the criminal legal apparatus.<sup>31</sup> And, it can lead to exploitation beyond that which the system has already legalized.

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<sup>26</sup> See THOMAS HARVEY ET AL., ARCHCITY DEFENDERS: MUNICIPAL COURTS WHITE PAPER 4 (Nov. 2014), <https://www.archcitydefenders.org/wp-content/uploads/2019/03/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf> [<https://perma.cc/6WGF-95CK>]; Radley Balko, *How Municipalities in St. Louis County, Mo., Profit from Poverty*, WASH. POST (Sept. 3, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/> [<https://perma.cc/JY2E-SNQG>] (“Some of the towns in St. Louis County can derive 40 percent or more of their annual revenue from the petty fines and fees collected by their municipal courts.”); see also Maura Ewing, *Why Texas Courts Will Stop ‘Nickel-and-Diming’ the Poor*, ATLANTIC (July 24, 2017), <https://www.theatlantic.com/politics/archive/2017/07/texas-court-fines/534363/> [<https://perma.cc/9T2X-AVKA>]; Jon Swaine, *Discrimination in Ferguson: Full Extent of Police Bias Laid Bare in Damning Report*, GUARDIAN (Mar. 4, 2015), <https://www.theguardian.com/us-news/2015/mar/04/ferguson-police-racial-persecution-federal-report> [<https://perma.cc/X3WZ-QJKW>].

<sup>27</sup> U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (Mar. 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/2FKW-ZJJ4>].

<sup>28</sup> *Id.* at 3–5. For additional insights on how race impacts monetary sanctions, see generally Ahmed Lavalais, *Monetizing the Super-Predator*, 81 OHIO ST. L.J. 983 (2020).

<sup>29</sup> NATAPOFF, *supra* note 8, at 85, 239; see also SUPREME COURT OF OHIO, REPORT AND RECOMMENDATIONS OF THE SUPREME COURT OF OHIO TASK FORCE ON THE FUNDING OF OHIO COURTS 22 (Nov. 2015), <http://www.supremecourt.ohio.gov/Boards/courtFunding/Report.pdf> [<https://perma.cc/HD2H-CH37>] [hereinafter TASK FORCE ON FUNDING OHIO COURTS] (“[T]he efficient and effective administration of justice is one of the most fundamental obligations of government and should be borne by the entire citizenry, not only those who avail themselves to the judicial system.”).

<sup>30</sup> NATAPOFF, *supra* note 8, at 85, 239. When asked how they were responding to budget reductions, more than half of the courts responded that they had increased filing fees, court costs, and special projects fees, prompting the Task Force to note “a troubling trend whereby courts are required to offset funding cuts by increasing fees on litigants precisely at the time when many litigants might also be experiencing economic hardship.” TASK FORCE ON FUNDING OHIO COURTS, *supra* note 29, at 25.

<sup>31</sup> RACHEL SWANER ET AL., CTR. FOR COURT INNOVATION, WHAT DO DEFENDANTS REALLY THINK? PROCEDURAL JUSTICE AND LEGITIMACY IN THE CRIMINAL JUSTICE SYSTEM 40 (Sept. 2018), [https://www.courtinnovation.org/sites/default/files/media/documents/2018-09/what\\_do\\_defendants\\_really\\_think.pdf](https://www.courtinnovation.org/sites/default/files/media/documents/2018-09/what_do_defendants_really_think.pdf) [<https://perma.cc/UN7E-46HY>]; Matthew Menendez, *Fees and Fines Threaten Judicial Independence*, ABA (Apr. 19, 2018),

### B. *The System Lacks Consistent and Formal Oversight*

Who reviews cost schedules, case documents, and itemized bills to ensure that individual court costs and fees are being properly imposed in each case and county? In reality, that oversight does not appear to formally fall on any government official's plate.<sup>32</sup> While the clerk, auditor, treasurer, and county commissioners may monitor the revenue collected and funds disbursed, it is unclear what processes, if any, exist within these offices to ensure the legitimacy of costs that are actually assessed.<sup>33</sup>

Judges levy the costs against the defendant, but rarely (if ever) include an estimation or calculation of the amount.<sup>34</sup> Prosecutors are statutorily charged with “faithfully . . . urg[ing]”<sup>35</sup> the collection of fines and costs, but they are no longer required to determine whether the costs are “correct and legal.”<sup>36</sup> (The Revised Code had previously placed this burden on prosecuting attorneys in cases where a “nonindigent” person has been convicted of a felony, but the responsibility was later removed.<sup>37</sup>) Clerks prepare the cost bill and total the charges, but do not review specific charges for legality. For example, in *State v. Smith*, the court found that the defendant had been impermissibly charged for

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[https://www.abajournal.com/news/article/fees\\_and\\_fines\\_threaten\\_judicial\\_independence](https://www.abajournal.com/news/article/fees_and_fines_threaten_judicial_independence) [<https://perma.cc/TY4X-BV3G>].

<sup>32</sup> See REPORT & RECOMMENDATIONS OF THE JOINT COMMITTEE TO STUDY COURT COSTS AND FILING FEES 9 (July 2008), <https://www.supremecourt.ohio.gov/Publications/JtCommCourtCostsReport.pdf> [<https://perma.cc/9QDV-QMSE>] [hereinafter JOINT COMMITTEE TO STUDY COURT COSTS]; TASK FORCE ON FUNDING OHIO COURTS, *supra* note 29, at 12.

<sup>33</sup> See, e.g., *State v. Davis*, 159 Ohio St.3d 31, 2020-Ohio-309, 146 N.E.3d 560, ¶ 20 (Donnelly, J., concurring) (“[I]t is incumbent on defense counsel to ensure that any court costs that have been assessed against his or her client are accurate and equitable.”). A 2015 Supreme Court task force report on court funding noted “the budget information provided to the Task Force by many courts lacked detailed information, including specific information as to the distribution and amounts of the various court fees and costs levied by the court.” TASK FORCE ON FUNDING OHIO COURTS, *supra* note 29, at 18. It also noted that no state entity, including the Supreme Court, “currently and regularly collects budgetary data from local courts.” *Id.* at 21. If even the amount of court debt is unclear, it is unlikely the legality and accuracy of costs in specific cases is being monitored.

<sup>34</sup> OHIO REV. CODE ANN. § 1901.26(A)(1)(a) (West 2020); OHIO REV. CODE ANN. § 2947.23(A)(1)(a) (West 2020); *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, ¶ 34.

<sup>35</sup> OHIO REV. CODE ANN. § 309.08(A) (West 2020).

<sup>36</sup> H.B. 153, 129th Gen. Assemb., Reg. Sess. § 101.01 (Ohio 2011). H.B. 153 deleted “[s]uch bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each item therein charged and certify to it if correct and legal” from § 2949.14 of the Ohio Revised Code, seemingly removing the duty from the prosecutor to ensure the itemized bill was correct and legal. *Id.*

<sup>37</sup> *Id.*; see also *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 14 (referencing the statute and duty).



both airfare *and* vehicle mileage for the execution of the warrant for his arrest.<sup>38</sup> The sheriff had included both the \$933.50 charge for airfare and a \$2,089 charge for mileage costs (presumably calculated as the distance the sheriff *would have traveled* had he driven a car to arrest the defendant).<sup>39</sup> The clerk added both of the fees to the cost bill, “inadvertently” giving the sheriff a “double recovery” against the defendant.<sup>40</sup> It was only after the issue was raised on appeal that it was corrected.<sup>41</sup>

As it stands (and as demonstrated by the previous example), defense attorneys are in the best position to identify abuses and seek resolution.<sup>42</sup> Indeed, because attorneys must provide effective assistance at sentencing—the time when costs are imposed—they should have an ethical duty to ensure the costs are correct and legal.<sup>43</sup> But, defense advocacy concerning court debt is woefully inadequate.<sup>44</sup> Even a simple request for a costs waiver for an indigent client is not a universal practice, and robust ability-to-pay discussions are few and far between.<sup>45</sup> Supreme Court of Ohio Justice Michael Donnelly recalls, “In my 14 years on the bench, actual requests for waiver were intermittent and certainly not the norm. And not once can I recall an instance where the itemization of the costs was called into question. It seemed like it was the last thing on defense counsel’s radar.”<sup>46</sup>

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<sup>38</sup> State v. Smith, 12th Dist. Warren No. CA2010–06–057, 2011-Ohio-1188, ¶¶ 54–55 (“However, it appears that the cost bill sent to Smith may have inadvertently provided the sheriff’s office with a double recovery against Smith.”), *rev’d in part*, State v. Smith, 131 Ohio St.3d 297, 2012-Ohio-781, 964 N.E.2d 432.

<sup>39</sup> *Id.* ¶ 57.

<sup>40</sup> *Id.* ¶ 55.

<sup>41</sup> *Id.* ¶ 58.

<sup>42</sup> See State v. Davis, 159 Ohio St.3d 31, 2020-Ohio-309, 146 N.E.3d 560, ¶ 20 (Donnelly, J., concurring) (“As a former trial-court judge, I am keenly aware that certain costs (such as witness-subpoena fees) have been incorrectly assessed against a first-named defendant in a case involving one or more codefendants. An indigent defendant would have no way of knowing whether a cost has been imposed inequitably. Thus, *it is incumbent on defense counsel to ensure that any court costs that have been assessed against his or her client are accurate and equitable.*”) (emphasis added).

<sup>43</sup> *Id.* ¶ 7 (citing State v. Schleiger, 141 Ohio St.3d 67, 2014-Ohio-3970, 21 N.E.3d 1033, ¶ 15) (“R.C. 2947.23 costs are imposed at sentencing and . . . sentencing is a critical stage in which a felony offender has a right to counsel . . .”); see also Gardner v. Florida, 430 U.S. 349, 358 (1977).

<sup>44</sup> For examples of court decisions rationalizing why attorneys failed to advocate for waiver of court costs, see, for example, State v. West, 8th Dist. Greene No. 2015-CA-72, 2017-Ohio-7521, ¶ 31; State v. Brown, 8th Dist. Cuyahoga No. 103427, 2016-Ohio-1546, ¶ 15; State v. Pultz, 6th Dist. Wood No. D-14-083, 2016-Ohio-329, ¶ 62; and State v. Farnese, 4th Dist. Washington No. 15CA11, 2015-Ohio-3533, ¶ 16.

<sup>45</sup> Pultz ¶ 62; E-mail from Michael Donnelly, Justice, Supreme Court of Ohio, to Nikki Trautman Baszynski (Sept. 27, 2020) [hereinafter Justice Donnelly’s E-mail] (on file with the *Ohio State Law Journal*).

<sup>46</sup> *Id.* Justice Donnelly does note that toward the end of his time on the bench, the Cuyahoga County Public Defender’s Office was consistently seeking waivers of court costs for their clients. *Id.*

Adam Vincent, a fellow with Southeastern Ohio Legal Services, explains that it is an issue often neglected in criminal cases, but with longterm consequences:

There are simply not a lot of eyes looking for unauthorized costs issues as they happen in criminal cases. Civil legal aid lawyers like myself are usually not in the picture until years after disposition, when someone with a record comes to us on a collateral issue (like record sealing or driver's license reinstatement). Analysis years later can still reveal unauthorized costs to challenge, but it doesn't solve the problem of bad practice happening in courts right now.<sup>47</sup>

Journalist Sarah Koenig briefly touched on this point in *Serial*'s third season, which focused on Cuyahoga County's court system.<sup>48</sup> The first episode of the podcast centered on a case involving a bar fight that resulted in the arrest and prosecution of "Anna" for felony assault on a peace officer.<sup>49</sup>

Anna ultimately walked out of court without a felony or prison time—"just" a fourth-degree misdemeanor.<sup>50</sup> But she later learned that in addition to the \$200 fine the court imposed, she would have to pay more than \$500 in court costs.<sup>51</sup> It was Koenig who appeared to first discover the existence of the court debt.<sup>52</sup> When Koenig inquired of defense counsel about these charges he laughed.<sup>53</sup> He had "no idea what this stuff was."<sup>54</sup> Anna had no idea that they were included in her sentence.<sup>55</sup> The attorney acknowledged that he could file a motion to waive them later if Anna could not pay them.<sup>56</sup> But, he neglected to admit that he also could have sought waiver at sentencing.<sup>57</sup> Either way, no one had reviewed Anna's cost bill for accuracy or legality.<sup>58</sup> Justice Donnelly, a former Cuyahoga County judge, echoes Koenig's concern: "Overall, we're not aware

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<sup>47</sup> E-mail from Adam Vincent, Ohio Access to Justice Fellow & Staff Attorney, Se. Ohio Legal Servs., to Nikki Trautman Baszynski (July 6, 2020) [hereinafter Vincent's E-mail] (on file with the *Ohio State Law Journal*).

<sup>48</sup> *Episode 01: A Bar Fight Walks into the Justice Center*, SERIAL SEASON THREE (Sept. 20, 2018), <https://serialpodcast.org/season-three/1/a-bar-fight-walks-into-the-justice-center> [<https://perma.cc/TVA8-5JC8>] [hereinafter *Episode 01*] (quoted language at 06:07 stating "[Koenig] showed them to [defense counsel] to ask if he could explain the itemized list. It's 14 different fees, some with names that suggested deep respect for catchall accounting—reparations, county operations, court special projects fund, something called add fee").

<sup>49</sup> *Id.* (discussion at 07:20).

<sup>50</sup> *Id.* (discussion at 38:45).

<sup>51</sup> Koenig says she owes \$784.50 to the court. *Id.* It is unclear whether this number includes the \$200 fine or is in addition to the \$200 fine. *Id.*

<sup>52</sup> *Id.* (discussion at 45:08).

<sup>53</sup> *Id.* (discussion at 45:25).

<sup>54</sup> *Episode 01*, *supra* note 48 (discussion at 45:20).

<sup>55</sup> *Id.* (discussion at 45:55).

<sup>56</sup> *Id.* (discussion at 45:40).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (discussion at 45:20–45:55).

of the amount of costs, we presume they're accurate, and we're not cognizant of their impact."<sup>59</sup>

### C. Strong and Consistent Advocacy Can Change Ohio Practices

As a state appellate defender, I practiced all over Ohio. Reviewing clients' records revealed many kinds of errors in many counties. Mileage falsification, unauthorized fees, inaccurate journal entries, excessive charges—the list was long. Doing this work further convinced me that the existence of court costs encourages exploitation and profiteering, necessitating the monitoring of its use and abuse. And the dearth of caselaw on the issue of unauthorized costs showed me that increased defender advocacy is essential.

I recognize that effective advocacy on this issue involves tedious work. It means reviewing, line by line, an itemized bill and comparing charges to corresponding documents. It means finding the relevant statutes to match the relevant fees. It means running addresses through Google Maps and calculating mileage.<sup>60</sup> It means calls to clerks of courts to bring clarity to this opaque system.<sup>61</sup> But the work can produce real change, for both individuals and systems, which I aim to illustrate in this Article. This is especially true when commonly accepted practices that work to punish people for their poverty are challenged and eliminated.<sup>62</sup>

Although this Article focuses on Ohio examples and caselaw, it may also serve as a guide and impetus for efforts in other states. While precedent and statutes differ, there are common principles and protections that can help identify arguments worth considering, researching, and developing.<sup>63</sup> For me, Houston defender Jani Maselli Wood's court debt advocacy in Texas was a source of inspiration for analyzing Ohio's systems.<sup>64</sup>

Broad, consistent, and effective defender advocacy challenging unlawful costs and court debt practices will bring needed oversight and correction to these systems. And ideally, this increased advocacy will push courts to investigate cost-related practices and make necessary changes.

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<sup>59</sup> Justice Donnelly's E-mail, *supra* note 46.

<sup>60</sup> See, e.g., *State v. Seymour*, 4th Dist. Ross No. 17CA3601, 2018-Ohio-1404, ¶ 14; *State v. Tabor*, 4th Dist. Jackson No. 16CA9, 2017-Ohio-8656, ¶ 43.

<sup>61</sup> For a dynamic map of Ohio's eighty-eight Clerks of Courts with contact information, see *County Clerks*, Ohio Clerk of Courts Ass'n, <https://www.occaohio.com/ohio-county-clerks.html> [https://perma.cc/D5XH-LMTW].

<sup>62</sup> See *infra* Part VII.

<sup>63</sup> See *infra* Part IV.

<sup>64</sup> Jo DePrang, *Houston Attorney Crusading Against 'Unconstitutional' Court Fees*, TEX. OBSERVER (Mar. 4, 2015), <https://www.texasobserver.org/houston-attorney-crusading-against-unconstitutional-court-fees/> [https://perma.cc/J67G-MZRZ]; Brian Rogers, *Houston Lawyer Crusades Against Court Costs*, HOUS. CHRONICLE (Apr. 5, 2015), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Houston-lawyer-crusades-against-court-costs-6180585.php> [https://perma.cc/TUM7-VGTD].

## III. OHIO COURT COSTS

In Ohio, the costs of prosecution encompass a wide range of charges that accumulate during the course of a criminal case: filing fees, application fees, mileage fees, warrant fees, warrant block fees, payment plan fees, probation violation fees, special projects fees . . . the list goes on and on.<sup>65</sup> They are the “financial charges imposed on defendants by courts, jails, cities, public defenders, prosecutors, probation officers, and clerks to pay for the operations of the criminal process itself.”<sup>66</sup> The fees are set forth in the Ohio Revised Code, court-specific cost schedules, and local rules.<sup>67</sup>

If a criminal case concludes with a conviction, trial courts are required to assess the costs of prosecution against the defendant.<sup>68</sup> This is a point worth emphasizing: it does not matter if the defendant is indigent, that the costs will be a substantial financial burden, or that it is unlikely the costs will ever be collected.<sup>69</sup> Courts are required to impose them along with the criminal sentence.<sup>70</sup>

Courts can choose to waive the costs if they find that the defendant is indigent.<sup>71</sup> They can also choose not to—it is entirely within the court’s discretion.<sup>72</sup> And while a person may subsequently seek to have the costs vacated, the Supreme Court of Ohio has rejected the argument that trial courts *must* consider ability to pay when reviewing a postconviction motion to waive,

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<sup>65</sup> See, e.g., OHIO REV. CODE ANN. § 120.36 (West 2020); OHIO REV. CODE ANN. § 311.17 (West 2020); OHIO REV. CODE ANN. § 2303.20 (West 2020); OHIO REV. CODE ANN. § 2303.201 (West 2020); OHIO REV. CODE ANN. § 2746.04 (West 2020); OHIO REV. CODE ANN. § 2746.07 (West 2020); OHIO REV. CODE ANN. § 2947.23 (West 2020); see also COLLECTION OF COURT COSTS, *supra* note 13 (detailing various court costs and fines); JOINT COMMITTEE TO STUDY COURT COSTS, *supra* note 32, at 3 (discussing “definitional confusion” in the use of terms “court costs” and “filing fees” in statutory code).

<sup>66</sup> City of Middleburg Heights v. Quinones, 120 Ohio St.3d 534, 2008-Ohio-6811, 900 N.E.2d 1005, ¶ 8 (“Costs, in the sense the word is generally used in this state, may be defined as being the statutory fees to which officers, witnesses, jurors, and others are entitled for their services in an action or prosecution, and which the statutes authorize to be taxed and included in the judgment or sentence.”) (citations omitted); NATAPOFF, *supra* note 8, at 26.

<sup>67</sup> See, e.g., OHIO REV. CODE ANN. § 2303.20 (West 2020); DEL. MUN. COURT, CRIMINAL & TRAFFIC DIVISION COST SCHEDULE 1 (June 2013), <http://www.municipal.court.org/wp-content/uploads/CRTR-Cost-Schedule.pdf> [<https://perma.cc/K9EL-HZP7>]; VAN WERT MUN. CT. LOCAL RULE 11, <http://www.vwmc.org/pdf/localRules.pdf> [<https://perma.cc/PM4P-RBR4>].

<sup>68</sup> OHIO REV. CODE ANN. § 2947.23(A)(1)(a) (West 2020); State v. White, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8.

<sup>69</sup> See White ¶ 8.

<sup>70</sup> § 2947.23.

<sup>71</sup> OHIO REV. CODE ANN. § 2949.092(C) (West 2020); State v. Threatt, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 1; White ¶¶ 9–15.

<sup>72</sup> State v. Taylor, 2020-Ohio-3514, 2020 WL 3579674, ¶ 16; Threatt ¶ 24.

suspend, or modify costs.<sup>73</sup> Simply, it is very difficult for an indigent defendant in Ohio to gain relief from the burden of court debt.<sup>74</sup>

Nevertheless, Ohio's legal system does not view court debt as "punishment."<sup>75</sup> Costs of prosecution are deemed civil in nature, which distinguishes them from financial sanctions, such as fines and restitution.<sup>76</sup> Confusingly, there are also "costs" that are considered financial sanctions instead of civil debts. This category includes the costs of confinement<sup>77</sup> and court-appointed counsel fees.<sup>78</sup> Like other financial sanctions, if a court wishes to impose these kinds of costs, they must first determine that the defendant has the ability to pay them<sup>79</sup> (although some courts neglect to engage in such analysis).<sup>80</sup> But again, generally speaking, court costs are not officially intended to punish the defendant, but instead meant to "lighten[] the burden on taxpayers financing the court system."<sup>81</sup>

Because the costs of prosecution are civil in nature, there are limits to how they may be collected once imposed. The Supreme Court of Ohio issued a two-page bench card<sup>82</sup> several years ago to remind courts about those limits, as reports showed many had been ignoring them.<sup>83</sup> For example, incarceration may

<sup>73</sup> See *Taylor* ¶ 16.

<sup>74</sup> See *id.*

<sup>75</sup> *State v. White*, 156 Ohio St.3d 536, 2019-Ohio-1215, 130 N.E.3d 247, ¶¶ 6–13 (holding that due to the designation of court debt as non-punishment, the assessment of costs alone in a criminal case is not a "sentence" for the purposes of taking an appeal).

<sup>76</sup> *Threatt* ¶ 15; see also COLLECTION OF COURT COSTS, *supra* note 13, at 1 (describing the difference between costs and fines).

<sup>77</sup> OHIO REV. CODE ANN. § 2746.02(C) (West 2020); OHIO REV. CODE ANN. § 2929.18(A)(5)(a)(ii) (West 2020) ("All or part of the costs of confinement under a sanction imposed pursuant to section 2929.14, 2929.142, or 2929.16 of the Revised Code, provided that the amount of reimbursement ordered under this division shall not exceed the total amount of reimbursement the offender is able to pay as determined at a hearing and shall not exceed the actual cost of the confinement.").

<sup>78</sup> OHIO REV. CODE ANN. § 2941.51(D) (West 2020) ("[I]f the person represented has, or reasonably may be expected to have, the means to meet some part of the cost of the services rendered to the person, the person shall pay the county an amount that the person reasonably can be expected to pay.").

<sup>79</sup> *Id.*

<sup>80</sup> *State v. Walker*, 6th Dist. Lucas No. L-18-1178, 2020-Ohio-839, ¶ 73; *State v. Gessel*, 6th Dist. Williams No. WM-19-004, 2020-Ohio-403, ¶ 28; *State v. Temple*, 6th Dist. Lucas No. L-18-1070, 2019-Ohio-3503, ¶¶ 13–15; *State v. Simon*, 6th Dist. Fulton No. F-18-012, 2019-Ohio-3020, ¶ 4; *State v. Thomas*, 6th Dist. Williams No. WM-18-005, 2019-Ohio-2654, ¶¶ 24, 27; *State v. Dangler*, 6th Dist. Williams No. WM-16-010, 2017-Ohio-7981, ¶¶ 6–8, *rev'd*, *State v. Dangler*, 2020-Ohio-2765, 2020 WL 2120915 (error raised but deemed moot because court failed to comply with Crim. R. 11(C)); *State v. Jones*, 6th Dist. Lucas No. L-16-1014, 2017-Ohio-413, ¶¶ 47–48.

<sup>81</sup> *Strattman v. Studt*, 253 N.E.2d 749, 754 (Ohio 1969).

<sup>82</sup> See generally COLLECTION OF COURT COSTS, *supra* note 13.

<sup>83</sup> See generally AM. CIVIL LIBERTIES UNION OF OHIO, THE OUTSKIRTS OF HOPE: HOW OHIO'S DEBTORS' PRISONS ARE RUINING LIVES AND COSTING COMMUNITIES 6–7 (Apr. 2013), <http://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013>

never be used to collect court costs, but it may be used, after certain steps are taken, for willful nonpayment of a fine.<sup>84</sup> It is helpful to keep in mind that court costs are a *civil* debt (like credit card bills or student loans) when considering whether a particular collection method is permissible and who can collect the debt.<sup>85</sup> To ensure that civil and criminal debts are collected only through permissible methods, courts must segregate the costs of prosecution and financial sanctions in the sentencing order and the cost bill, which itemizes all fees, fines, and financial sanctions.<sup>86</sup>

#### IV. WHAT MAKES A COST “UNAUTHORIZED”?

Simply put, the term “unauthorized court costs” refers to any costs that are not permitted by law.<sup>87</sup> This may mean that the fee itself is not statutorily authorized or that the fee is in excess of that permitted by statute.<sup>88</sup> There are also circumstances where the facts or record do not support the assessment of the fee.<sup>89</sup> For example, a clerk may be statutorily authorized to collect a fee for calling a jury, but if no jury was ever empaneled, no fee should be charged.<sup>90</sup>

I also use this term to describe fees that are the result of mischaracterization or misuse. Arguably, actions that increase court costs in a way that serves no legitimate purpose other than profit-making should be deemed contrary to law,

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\_04.pdf [https://perma.cc/2W2S-X7AK] (“Despite clear constitutional and legislative prohibitions, debtors’ prison practices are alive and well throughout Ohio.”); Press Release, Am. Civil Liberties Union, Ohio Supreme Court Creates Bench Card After ACLU Investigation Found Courts Jailing People Too Poor to Pay Fines (Feb. 5, 2014), <https://www.aclu.org/press-releases/court-takes-swift-action-end-debtors-prison> [https://perma.cc/44LA-BZNS].

<sup>84</sup> OHIO REV. CODE ANN. § 2947.14(A), (C) (West 2020); *Strattman*, 253 N.E.2d at 751–52.

<sup>85</sup> See, e.g., *State v. Johnson*, 2016-Ohio-5160, 69 N.E.3d 176, ¶ 33 (2d Dist.); *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶¶ 15–16 (“[A]n indigent criminal defendant is really no different from any other indigent who owes a debt.”); *State v. Swift*, 2d Dist. Montgomery No. 20543, 2005-Ohio-1595, ¶ 22.

<sup>86</sup> *Johnson* ¶ 35; *Swift* ¶ 22.

<sup>87</sup> Mark Hansen, *Court Officials Collected ‘Unauthorized’ Court Costs From Defendants, Suit Says*, ABA (Sept. 26, 2013), [https://www.abajournal.com/news/article/court\\_officials\\_collected\\_unauthorized\\_court\\_costs\\_suit\\_says](https://www.abajournal.com/news/article/court_officials_collected_unauthorized_court_costs_suit_says) [https://perma.cc/U556-CV88]; *Unauthorized*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/unauthorized> [https://perma.cc/NM46-ATSJ].

<sup>88</sup> See, e.g., *State v. Christy*, 3d Dist. Wyandot No. 16–04–04, 2004-Ohio-6963, ¶ 22.

<sup>89</sup> See *State v. Christian*, 7th Dist. Jefferson No. 04 JE 20, 2005-Ohio-905, ¶ 18.

<sup>90</sup> OHIO REV. CODE ANN. § 2947.23(A)(2)(b) (West 2020) (stating a defendant may be charged the cost of summoning a jury that is never empaneled, only when the defendant fails to “appear without good cause” or the defendant entered a guilty or no contest plea “twenty-four hours” before commencement of trial); cf. *Christian* ¶¶ 16–17 (noting that a trial court may not assign jury fees outside of statutory authorization).

as such actions are not related to prosecution but rather to profit.<sup>91</sup> And actions by courts to misuse costs merit the designation “unauthorized,” as those cost are functioning in an impermissible way. They should be challenged as aggressively as those costs that are explicitly contrary to law.

This Article is intended to serve as a toolkit for those who wish to challenge the illegal imposition and collection of court debt. In some instances, court decisions offer a clear answer as to whether a cost is unauthorized by law.<sup>92</sup> In others, the facts of the case clearly show the cost is unauthorized.<sup>93</sup> In still others, a combination of precedent, principles, and arguments call into question the legality or appropriateness of the cost or practice.<sup>94</sup> But whether something is “unauthorized” is a question that may prompt differing answers in different courts or cases. This is an underdeveloped area of the law in need of greater clarity.

Close analysis of cost bills and court practices combined with consistent challenges to those questionable and clearly unlawful practices will both further collective understanding of the limits of court debt and mitigate misuse and negligence. To that end, the following four principles will aid you in determining whether a cost or fee is unauthorized or is being used in an impermissible way:

1. Costs are not punishment. Costs of prosecution are a civil debt, not a criminal punishment.<sup>95</sup> If it seems like costs are being assessed or used in a way to punish the defendant, they may be unauthorized.<sup>96</sup>
2. Costs are included in sentencing entries. Costs are imposed at the sentencing hearing and included in the sentencing entry.<sup>97</sup> As a result, a court cannot impose costs on dismissed charges or charges for which the defendant was found not guilty because there is no criminal sentence associated with such charges.<sup>98</sup>

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<sup>91</sup> OHIO REV. CODE ANN. § 2947.23(A)(1)(a) (West 2020) (“In all criminal cases . . . the judge or magistrate shall include in the sentence the *costs of prosecution* . . .”) (emphasis added); see, e.g., *Christy* ¶ 22 (stating the cost of prosecution cannot include towing fees).

<sup>92</sup> See, e.g., *Christy* ¶ 22.

<sup>93</sup> See, e.g., *In re Helfrich*, 5th Dist. Licking No. 13CA20, 2014-Ohio-1933, ¶ 62.

<sup>94</sup> See, e.g., *State v. Lunsford*, 193 Ohio App.3d 195, 2011-Ohio-964, 951 N.E.2d 464, ¶¶ 16–17 (2d Dist.).

<sup>95</sup> *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 15.

<sup>96</sup> See, e.g., *id.* at ¶ 24.

<sup>97</sup> OHIO REV. CODE ANN. § 2947.23 (West 2020). But see *State v. White*, 156 Ohio St.3d 536, 2019-Ohio-1215, 130 N.E.3d 247, ¶ 15.

<sup>98</sup> *In re Helfrich*, 5th Dist. Licking No. 13CA20, 2014-Ohio-1933, ¶ 62; *City of Cleveland Heights v. Machlup*, 5th Dist. Cuyahoga No. 93086, 2009-Ohio-6468, ¶ 19; *State v. Karasek*, 2d Dist. Montgomery Nos. 17408, 17563, 2002-Ohio-2616, ¶ 10.

3. Costs must be statutorily authorized. Court costs must be “identified by a specific statutory authorization.”<sup>99</sup> Just as the legislature sets limits on the court’s ability to impose punishment on defendants, it also constrains the court’s ability to assess costs.<sup>100</sup> And while there are a plethora of fees authorized by the Ohio Revised Code, they are not limitless.<sup>101</sup>
4. Costs Must Be Directly Related to the Court Proceedings. Courts are required to assess the “costs of prosecution.”<sup>102</sup> If a cost is not directly related to the court proceedings in the case for which the defendant has been convicted, they may be unauthorized.<sup>103</sup>

## V. FINDING UNAUTHORIZED COSTS

To find and identify unauthorized court costs, you will need to review several sources of information in the case.

### A. Itemized Bill

If a court imposes a “judgment for costs,”<sup>104</sup> the person who must pay the costs is entitled to an itemized bill.<sup>105</sup> So, the first step in reviewing costs is getting this itemized bill.

The itemized bill, or “cost bill,” should set forth each fee that was assessed in a case.<sup>106</sup> Sometimes, the bill will be very specific and include references to the statute that authorizes each charge.<sup>107</sup> Others will provide vague descriptions

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<sup>99</sup> *City of Middleburg Heights v. Quinones*, 120 Ohio St.3d 534, 2008-Ohio-6811, 900 N.E.2d 1005, ¶ 8 (quoting *State v. Christy*, 3d Dist. Wyandot No. 16-04-04, 2004-Ohio-6963, ¶ 22.).

<sup>100</sup> *See State v. Christy*, 3d Dist. Wyandot No. 16-04-04, 2004-Ohio-6963, ¶ 22 (providing statutory examples of what fees the Ohio Revised Code will allow a sentencing court to charge a criminal defendant).

<sup>101</sup> *See, e.g.*, OHIO REV. CODE ANN. § 2746 (West 2020).

<sup>102</sup> *Id.* § 2947.23(A)(1)(a); *Christy* ¶ 19–22.

<sup>103</sup> *State v. Lunsford*, 193 Ohio App.3d 195, 2011-Ohio-964, 951 N.E.2d 464, ¶¶ 16–17 (2d Dist.).

<sup>104</sup> *State v. Dooley*, 5th Dist. Muskingum No. CT2019-0054, 2020-Ohio-3947, ¶ 27.

<sup>105</sup> OHIO REV. CODE ANN. § 2335.32 (West 2020) (“In all cases, when demanded by a person liable for the payment of any fees or costs to an officer, such officer, without charge, shall make, sign, and deliver to the person an itemized bill of such fees or costs.”).

<sup>106</sup> This is the document containing the three \$124 charges for certified copies introduced in Part I. Criminal Costs Listing at 1, *State v. [redacted, [redacted]]* No. [redacted] ([redacted]) (on file with the *Ohio State Law Journal*); *see also* OHIO REV. CODE ANN. § 2335.32 (West 2020); Cost Bill at 1, *State v. [redacted]*, Franklin C.P. No. [redacted] (Jan. 23, 2017) (on file with the *Ohio State Law Journal*).

<sup>107</sup> *See, e.g.*, Cost Bill at 1, *State v. [redacted]*, Franklin C.P. No. [redacted] (Jan. 29, 2016) (on file with the *Ohio State Law Journal*).



that may require follow-up with the clerk or prosecutor.<sup>108</sup> The important thing is that the bill clearly state the total amount of costs and which specific fees make up that total.<sup>109</sup>

### B. Cost Schedules and Court Websites

The costs and fees that may be assessed by courts of common pleas are established in the Revised Code.<sup>110</sup> Constraints on county courts, municipal courts, and juvenile courts are also included in the Revised Code.<sup>111</sup> Courts may also establish special projects fees, which should be designated as such in local rules.<sup>112</sup>

Municipal and county courts differ from common pleas courts in that they can establish their own cost schedules, setting local limits for the fees they will charge.<sup>113</sup> This, unsurprisingly, leads to vast disparities in costs for similar activities. For example, in Delaware City Municipal Court, the issuance of a warrant will cost a defendant \$60, while in neighboring Franklin County, the cost of an issued warrant is just \$2.<sup>114</sup> If you cannot afford to pay your total court debt immediately, and instead seek to pay it over time, it will cost you—but not consistently. “Berea, East Cleveland, Garfield Heights, Lyndhurst, Shaker Heights, South Euclid and Rocky River charge \$25 to start a payment plan. Bedford and Euclid charge \$5, Cleveland Heights charges \$10, Parma

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<sup>108</sup> See, e.g., *City of Middleburg Heights v. Quinones*, 120 Ohio St.3d 534, 2008-Ohio-6811, 900 N.E.2d 1005, ¶ 15 (remanding to clarify cost record); Itemized Statement, State v. [redacted], Scioto C.P. No. [redacted] (Oct. 23, 2017) (on file with the *Ohio State Law Journal*) (separating special projects fees).

<sup>109</sup> See, e.g., Cost Bill at 1, State v. [redacted], Franklin C.P. No. [redacted] (Jan. 23, 2017) (on file with the *Ohio State Law Journal*). Though it is a cost bill, it also usually will include any financial sanctions that are owed, which should be clearly identified as such to protect the defendant from impermissible collection methods. *Id.* (listing restitution as the financial sanction).

<sup>110</sup> See, e.g., OHIO REV. CODE ANN. § 311.17 (West 2020); OHIO REV. CODE ANN. § 2746.01 (West 2020); OHIO REV. CODE ANN. § 2746.04 (West 2020).

<sup>111</sup> OHIO REV. CODE ANN. § 2746.05 (West 2020); OHIO REV. CODE ANN. § 2746.07 (West 2020); OHIO REV. CODE ANN. § 2746.08 (West 2020).

<sup>112</sup> See, e.g., OHIO REV. CODE ANN. § 2303.201(E) (West 2020).

<sup>113</sup> See, e.g., OHIO REV. CODE ANN. § 1901.26 (West 2020); OHIO REV. CODE ANN. § 1907.24(A)(1) (West 2020) (“[S]hall establish a schedule of fees and costs to be taxed in any civil or criminal action or proceeding.”).

<sup>114</sup> Compare DEL. MUN. COURT, CRIMINAL & TRAFFIC DIVISION COST SCHEDULE 6 (Mar. 2019), <http://www.municipalcourt.org/wp-content/uploads/Crim-and-Traffic-Costs-effective-3.15.19.pdf> [<https://perma.cc/76MH-JN7F>] [hereinafter DEL. COST SCHEDULE], with FRANKLIN CTY. MUN. COURT, SCHEDULE 9.00: COSTS AND FEES 4, <http://www.fcmcclerk.com/documents/local-rules/FCMC-Local-Rule-13-Schedule-09.pdf> [<https://perma.cc/P32Z-A5CM>].

charges \$20 and Cleveland charges \$5 a month.”<sup>115</sup> Empowering municipal courts to set their own fees has also empowered them to establish fee schedules that create stark differences in court debt.<sup>116</sup>

Accordingly, getting the court’s cost schedule is especially important in cases involving misdemeanor convictions.<sup>117</sup> Cost schedules can also be helpful in determining whether an unauthorized cost is specific to your case or is an established practice in the jurisdiction.<sup>118</sup>

### C. Court Documents

Court documents are often necessary to determine whether an overcharge has occurred or whether a cost is connected to a dismissed charge.<sup>119</sup> For example, mileage costs are often included on subpoenas and warrant returns.<sup>120</sup> By reviewing the recipient’s address and the mileage charge, you can determine whether the mileage is accurate or has been inflated.

## VI. ANALYZING UNAUTHORIZED COSTS

The following Parts provide examples of various kinds of unauthorized court costs you might see in your jurisdiction or case.<sup>121</sup> When available, precedent is included to assist with developing a legal challenge to a similar issue. In some cases, you will find that a court has deemed the cost impermissible and vacated the charges. And in some, you will see that the issue was resolved informally through discussions with the clerk of courts. But, in others, you will note there was no resolution. Despite concerns that a practice is unlawful or a fee is impermissible, government actors may nonetheless fail to investigate further, change course, or remedy the issue. These instances show the necessity of challenging these practices to ensure that they are stopped.

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<sup>115</sup> Sara Dorn, *Some Cuyahoga County Municipal Courts Bluff About Their Payment Plans*, CLEVELAND.COM (Apr. 27, 2017), [https://www.cleveland.com/metro/2017/04/some\\_cuyahoga\\_county\\_municipal.html](https://www.cleveland.com/metro/2017/04/some_cuyahoga_county_municipal.html) [https://perma.cc/CN9P-ETVZ].

<sup>116</sup> *See id.*

<sup>117</sup> *See* OHIO REV. CODE ANN. § 1901.20(A)(1) (West 2020) (“The municipal court has jurisdiction to hear misdemeanor cases committed within its territory.”).

<sup>118</sup> OHIO REV. CODE ANN. § 1907.24 (West 2020); *see, e.g., Criminal Cost Schedule* CLEVELAND MUN. COURT (Mar. 17, 2018), <https://clevelandmunicipalcourt.org/clerk-of-courts/criminal-traffic-division/criminal-cost-schedule> [https://perma.cc/72B8-6DRU]. For example, if the cost schedule clearly shows an impermissible cost, the problem would affect every person with a conviction and assessed costs in that jurisdiction. Conversely, an unauthorized cost may be the result of miscalculation or a clerical error in a specific case.

<sup>119</sup> *See, e.g., State v. Seymour*, 4th Dist. Ross No. 17CA3601, 2018-Ohio-1404, ¶ 16.

<sup>120</sup> *See, e.g., id.* ¶ 14; *Subpoena – Civil*, FRANKLIN CTY. COURT OF COMMON PLEAS, <https://clerk.franklincountyohio.gov/CLCT-website/media/Docs/general/CivilSubpoena.pdf> [https://perma.cc/L5KC-RZE2].

<sup>121</sup> The examples focus on actions, documents, and outcomes. No commentary regarding motives or intentions is intended in this text.

### A. *Unauthorized Fees*

#### 1. *Unauthorized Towing and Storage Fees*

A fatal car accident resulted in the prosecution and conviction of a defendant in Wyandot County.<sup>122</sup> He was sentenced to a term of eight years in prison and was ordered to pay restitution to the victim's family, the Wyandot County Sheriff's Office, and Johnson's Towing.<sup>123</sup>

The defendant appealed his conviction to the Third District Court of Appeals, raising only one assignment of error relating to restitution order: the towing company and the Sheriff's Office were not victims of the crime, so they could not collect restitution in the case.<sup>124</sup>

The appellate court agreed with the defendant, and found that neither Johnson's Towing nor the Wyandot Sheriff's Office was entitled to restitution.<sup>125</sup> In response to the defendant's argument, the State proposed that the expenses were authorized as "financial sanctions."<sup>126</sup> To this, the court explained that the towing and storage of the defendant's vehicle were not "incident to a sanction imposed upon" the defendant, so they were not authorized under § 2929.18(A)(4) of the Ohio Revised Code.<sup>127</sup>

Not giving up, the State tried another argument: the towing and storage fees were simply the "costs of prosecution," and thus authorized under § 2947.23 of the Ohio Revised Code.<sup>128</sup>

The Third District remained unconvinced that there was any legal authority to order the defendant to pay towing or storage fees.<sup>129</sup> The court ultimately held that "[t]he expenses which may be taxed as costs in a criminal case are those directly related to the court proceedings and are identified by a specific statutory authorization."<sup>130</sup> The towing and storage fees could not be considered "costs of prosecution," as there was no statute authorizing such charges.<sup>131</sup> The court vacated the costs, resulting in a court debt reduction of \$994 for the client.<sup>132</sup>

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<sup>122</sup> State v. Christy, 3d Dist. Wyandot No. 16-04-04, 2004-Ohio-6963, ¶¶ 1-2.

<sup>123</sup> *Id.* ¶ 3.

<sup>124</sup> *Id.* ¶ 6.

<sup>125</sup> *Id.* ¶¶ 15-17.

<sup>126</sup> *Id.* ¶ 19.

<sup>127</sup> *Id.* ¶ 20.

<sup>128</sup> Christy ¶ 21.

<sup>129</sup> *Id.* ¶ 22.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* ¶¶ 6, 23.

## 2. Unauthorized Microfilming Fees

Microfilming is the process of creating a “miniature photographic copy of printed or other graphic matter.”<sup>133</sup> Muskingum County microfilms its criminal case records, which is entirely within its discretion to do.<sup>134</sup> However, the clerk charges defendants a per-page fee for this service, which can result in hundreds of dollars of additional court costs.<sup>135</sup> There is no apparent or identified statutory authorization for this fee, which would make it impermissible, like the towing and storage fees in *State v. Christy*.<sup>136</sup>

Given the potentially sizable amount of the fee, its universal application, and the number of criminal cases in Muskingum County, it is possible the county has assessed thousands of dollars of unauthorized court costs from this practice.<sup>137</sup>

## 3. Unauthorized Jury Fees

Understanding what circumstances authorize a fee is also important. For example, Revised Code § 2947.23 permits courts to assess the costs of a jury against the defendant.<sup>138</sup> But, that provision specifies that juror fees are only permitted if the jury has been sworn at the trial of the case.<sup>139</sup> In *State v. Harshman*, the Third District Court of Appeals vacated a judgment against the

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<sup>133</sup> *Microfilm*, DICTIONARY.COM, <https://www.dictionary.com/browse/microfilm> [<https://perma.cc/L4VK-YQHE>].

<sup>134</sup> See, e.g., *State v. [redacted]*, 5th Dist. Muskingum No. [redacted], [redacted]-Ohio-[redacted], ¶ 37 (on file with the *Ohio State Law Journal*).

<sup>135</sup> See, e.g., *id.*; see also Docket Information, *State v. [redacted]*, Muskingum C.P. No. [redacted] (Oct. 23, 2019) (on file with the *Ohio State Law Journal*); Docket Information, *State v. [redacted]*, Muskingum C.P. No. [redacted] (Mar. 17, 2017) (on file with the *Ohio State Law Journal*); Docket Information, *State v. [redacted]*, Muskingum C.P. No. [redacted] (Feb. 24, 2016) (on file with the *Ohio State Law Journal*).

<sup>136</sup> See *State v. Christy*, 3d Dist. Wyandot No. 16-04-04, 2004-Ohio-6963, ¶¶ 15-23; E-mail from Wendy Sowers, Clerk of Courts, Muskingum Cty., to Nikki Trautman Baszynski (Sept. 8, 2020) (on file with the *Ohio State Law Journal*).

<sup>137</sup> See generally DEBRAH J. NYE, COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE YEAR ENDED DECEMBER 31, 2016, at 166, reprinted in DAVE YOST, MUSKINGUM COUNTY SINGLE AUDIT FOR THE YEAR ENDED DECEMBER 31, 2016 (2017) (showing total Muskingum County Court fees for 2016); THE SUPREME COURT OF OHIO, OHIO COURTS STATISTICAL REPORT 2017, at 59 (2017), <http://www.supremecourt.ohio.gov/Publications/annrep/17OCSR/2017OCSR.pdf> [<https://perma.cc/75GN-GKTE>] (showing a total of 469 criminal case terminations in Muskingum County in 2017).

<sup>138</sup> OHIO REV. CODE ANN. § 2947.23(A)(2)(a)–(b) (West 2020).

<sup>139</sup> *Id.* § 2947.23(A)(2)(a) (“If a jury has been sworn at the trial of a case, the fees of the jurors shall be included in the costs, which shall be paid to the public treasury from which the jurors were paid.”).

defendant for \$360 in juror fees because the jury had never been sworn and did not serve in his case.<sup>140</sup>

## B. *Excessive Fees*

### 1. *Excessive Probation Fees*

Ohio law limits the amount of money a person may be charged each month for supervision to \$50.<sup>141</sup> Additional fees may accompany the supervision fee, but they are separately authorized.<sup>142</sup>

But some courts still charge more. In Stark County, for example, the court transitioned in 2012 from its monthly \$20 fee to a flat fee of \$250, due at the beginning of the supervision term.<sup>143</sup> Van Wert Municipal Court similarly charges a “one-time supervision fee.”<sup>144</sup> In Jackson County, “[t]he probation fee for all probationers in the Jackson County Municipal Court shall be \$240.00 per case.”<sup>145</sup> The rule permits the fee to be paid within “30 days of sentencing or added to the defendant’s other court costs and set up on a payment plan.”<sup>146</sup> A person requiring a payment plan longer than 30 days must pay an additional \$25 fee in the Jackson County Municipal Court.<sup>147</sup>

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<sup>140</sup> *State v. Harshman*, 156 Ohio App.3d 452, 2004-Ohio-1202, 806 N.E.2d 598, ¶ 12 (3d Dist.).

<sup>141</sup> OHIO REV. CODE ANN. § 2951.021(A)(2) (West 2020) (“No person shall be assessed, in any month, more than fifty dollars in supervision fees.”); *see also id.* § 2951.021(A)(1) (“If a court places a misdemeanor offender under a community control sanction . . . or places a felony offender under a community control sanction . . . and if the court places the offender under the control and supervision of a probation agency, the court may require the offender, as a condition of community control, to pay a monthly supervision fee of not more than fifty dollars for supervision services.”).

<sup>142</sup> For example, § 2929.18 of the Ohio Revised Code permits a financial sanction in the form of “[a]ll or part of the costs of implementing any community control sanction, including a supervision fee under section 2951.021 of the Revised Code[.]” *Id.* § 2929.18(A)(5)(a)(i).

<sup>143</sup> *See* E-mail from Nikki Trautman Baszynski to Louis Giavasis, Clerk of Courts, Stark Cty. (Feb. 21, 2020) (on file with the *Ohio State Law Journal*). I observed the fee on a criminal case docket and called the clerk’s office to ask about their supervision fees. An assistant in the clerk’s office noted that “intensive supervision” required a flat \$250. *Id.* This issue was raised with the clerk of courts, who responded that the fee was authorized by a 2012 court order. *Id.* My understanding is that court orders may not supersede statutes. I conveyed this to the clerk but received no further response. *Id.*

<sup>144</sup> VAN WERT MUN. CT. LOCAL RULE 55, <http://www.vwmc.org/pdf/localRules.pdf> [<https://perma.cc/PM4P-RBR4>].

<sup>145</sup> JACKSON CTY. MUN. CT. LOCAL RULE 24, <https://www.jacksoncountymunicipal.court.com/pdf/rules-20150803.pdf> [<https://perma.cc/ZF2Z-BTA3>].

<sup>146</sup> *Id.*

<sup>147</sup> JACKSON CTY. MUN. CT. LOCAL RULE 36, <https://www.jacksoncountymunicipal.court.com/pdf/rules-20150803.pdf> [<https://perma.cc/ZF2Z-BTA3>].

Delaware City Municipal Court's cost schedule indicates that it abides by the \$50-per-month limit (it charges \$25).<sup>148</sup> However, in practice, the clerk charges the defendant for the projected amount of supervision fees at the beginning of the probation term.<sup>149</sup> So, a person sentenced to a year of probation would immediately owe \$300, instead of the \$25 monthly fee.

The problem with this flat-fee practice (in addition to being contrary to § 2951.02 of the Ohio Revised Code) is that it results in some people paying for supervision that never occurs. If someone violates probation and a term of incarceration is subsequently imposed, the person ends up owing money (or already paying) for months of supervision that were never provided. Absent a motion to vacate those unauthorized costs, the person is stuck facing the full amount.

## 2. Excessive State Fees

The Ohio General Assembly created two fees that must be assessed in every case where the court assesses costs.<sup>150</sup> For ease of discussion, we can call them the "bail fee"<sup>151</sup> and the "reparations fee."<sup>152</sup> The amount of the imposed fee depends on the conviction. For felonies, the bail fee and the reparations fee are each \$30.<sup>153</sup> For misdemeanors, the bail fee is \$20 and the reparations fee is

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<sup>148</sup> DEL. COST SCHEDULE, *supra* note 114, at 2.

<sup>149</sup> *See, e.g.*, Motion to Supplement the Record at 4, State v. [redacted], 5th Dist. Delaware No. [redacted], [redacted]-Ohio-[redacted] (on file with the *Ohio State Law Journal*) (showing a charge of \$300 at a rate of \$25 per month for a year of community control fees); Merit Brief of [redacted] at 10, State v. [redacted], 5th Dist. Delaware No. [redacted], [redacted]-Ohio-[redacted] (on file with the *Ohio State Law Journal*) (explaining that the community control was terminated early and therefore the full \$300 should not be charged).

<sup>150</sup> OHIO REV. CODE ANN. § 2743.70(A)(1) (West 2020) ("The court shall not waive the payment of the thirty or nine dollars court costs, unless the court determines that the offender is indigent and waives the payment of all court costs imposed upon the indigent offender."); OHIO REV. CODE ANN. § 2949.091(A)(1)(b) (West 2020) ("The court shall not waive the payment of the additional thirty-, twenty-, or ten-dollar court costs, unless the court determines that the offender is indigent and waives the payment of all court costs imposed upon the indigent offender.").

<sup>151</sup> *See* OHIO REV. CODE ANN. § 2949.091(B) (West 2020) ("Whenever a person is charged with any offense described in division (A)(1) of this section, the court shall add to the amount of the bail the thirty, twenty, or ten dollars required to be paid by division (A)(1) of this section.").

<sup>152</sup> Section 2743.70 of the Ohio Revised Code is titled "Additional costs in criminal cases in all courts to fund reparations payments." OHIO REV. CODE ANN. § 2743.70 (West 2020).

<sup>153</sup> OHIO REV. CODE ANN. § 2743.70(A)(1)(a) (West 2020); OHIO REV. CODE ANN. § 2949.091(A)(1)(a)(i) (West 2020).

\$9.<sup>154</sup> In other words, if you are convicted of a felony, you must pay \$60 in state fees. Misdemeanor convictions will cost you \$29.

In Franklin County, these fees are assessed at the beginning of the case when the defendant is charged, which is permissible.<sup>155</sup> But, the fees are never adjusted at the end of the case to reflect the crime of which the person was actually convicted.<sup>156</sup> So, when defendants are charged with a felony, but plead guilty to a misdemeanor, they end up owing \$31 more than the law requires. By spot-checking the Franklin County Case Information System, I determined this practice has been going on since at least 2015.<sup>157</sup> Considering how common it is to resolve cases by pleading guilty to lesser offenses,<sup>158</sup> it is likely that this practice has resulted in the assessment of thousands of dollars in unauthorized costs.

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<sup>154</sup> OHIO REV. CODE ANN. § 2743.70(A)(1)(b) (West 2020); OHIO REV. CODE ANN. § 2949.091(A)(1)(a)(ii) (West 2020).

<sup>155</sup> See OHIO REV. CODE ANN. § 2743.70(A)(1)(b), (B) (West 2020); OHIO REV. CODE ANN. § 2949.091(A)(1)(a)(ii), (2)(a)(ii), (B) (West 2020).

<sup>156</sup> E-mail from Sharlene I. Chance, Legal Compliance Officer, Franklin Cty. Clerk of Courts, to Nikki Trautman Baszynski (Sept. 10, 2020) [hereinafter Chance's E-mail] (on file with the *Ohio State Law Journal*).

<sup>157</sup> A comparison of the cost bills and judgment entries in the following cases demonstrates that the defendants were charged a bail fee and a reparations fee corresponding to the statutory amount for felonies in final cost bills that were generated after judgment entries stating that the defendants had plead guilty to misdemeanor offenses. *Compare* Cost Bill at 1, State v. [redacted], Franklin C.P. No. [redacted] (Jan. 28, 2019) (on file with the *Ohio State Law Journal*), with Judgment Entry at 1, State v. [redacted], Franklin C.P. No. [redacted] (Dec. 2, 2019) (on file with the *Ohio State Law Journal*); *compare* Cost Bill at 1, State v. [redacted], Franklin C.P. No. [redacted] (Jan. 31, 2018) (on file with the *Ohio State Law Journal*), with Judgment Entry at 1, State v. [redacted], Franklin C.P. No. [redacted] (Oct. 10, 2018) (on file with the *Ohio State Law Journal*); *compare* Cost Bill at 1, State v. [redacted], Franklin C.P. No. [redacted] (Jan. 23, 2017) (on file with the *Ohio State Law Journal*), with Judgment Entry at 1, Cost Bill, State v. [redacted], Franklin C.P. No. [redacted] (Jan. 2, 2019) (on file with the *Ohio State Law Journal*); *compare* Cost Bill at 1, State v. [redacted], Franklin C.P. No. [redacted] (Jan. 29, 2016) (on file with the *Ohio State Law Journal*), with Judgment Entry at 1, Cost Bill at 1, State v. [redacted], Franklin C.P. No. [redacted] (Jan. 24, 2017) (on file with the *Ohio State Law Journal*); *compare* Cost Bill at 1, State v. [redacted], Franklin C.P. No. [redacted] (Feb. 2, 2015) (on file with the *Ohio State Law Journal*), with Judgment Entry at 1, State v. [redacted], Franklin C.P. No. [redacted] (Mar. 9, 2017) (on file with the *Ohio State Law Journal*).

<sup>158</sup> See generally CUYAHOGA CTY. COMMON PLEAS COURT, 2018 ANNUAL REPORT (2018), <https://cp.cuyahogacounty.us/media/2463/2018-annual-report.pdf> [<https://perma.cc/8N2M-66U6>]; JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW CASES AND MATERIALS 7 (8th ed. 2019) ("Nearly always, a guilty plea is the result of bargaining . . . plea rates vary by jurisdiction, by offense, and by year, but the conviction rate obtained by guilty pleas typically nears or exceeds ninety percent."); *Episode 01*, *supra* note 48 ("I remember one judge told me—and this is—one judge told me, in this county, innocence is a misdemeanor.") (quoting Cleveland defense attorney Russ Bensing at 32:30).

I raised this concern with the Franklin County Clerk of Courts in February 2020. Seven months later, the clerk's office confirmed that this practice is occurring, that it is improper, and that it is working on a solution.<sup>159</sup>

### 3. *Excessive Expungement Fees*

The fees to expunge one's record are one of the few criminal filing fees listed on the Erie County Clerk of Court's website.<sup>160</sup> Specifically, a chart on that site indicates that a motion to expunge a record costs \$100.<sup>161</sup> Because the Ohio Revised Code limits the fee for an application to seal criminal records to \$50,<sup>162</sup> I inquired further. The clerk returned a legal opinion that responded to my query in two parts.<sup>163</sup> First, it explained that the \$100 fee was actually a deposit for costs that would cover not only the \$50 fee, but also any additional fees that might accrue as part of the resulting proceedings.<sup>164</sup> Second, "[a]ny net balance remaining after fees and costs are incurred, shall be returned to the applicant."<sup>165</sup> While that sounded like a reasonable explanation, the chart on the clerk's website explicitly stated the opposite: the \$100 fee was non-refundable.<sup>166</sup>

The legal opinion also confirmed that the clerk was only permitted to charge one \$50 fee, regardless of how many convictions a given application seeks to seal.<sup>167</sup> However, the chart on the clerk's website notes that the applicant must pay the \$100 non-refundable filing fee *per case*.<sup>168</sup> Requiring a deposit for costs that should not be collected seems an unreasonable, and potentially unlawful, practice.

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<sup>159</sup> See Chance's E-mail, *supra* note 156.

<sup>160</sup> *Criminal Division*, ERIE COUNTY OHIO, <https://www.eriecounty.oh.gov/CriminalDivision.aspx> [<https://perma.cc/85VX-C7GW>].

<sup>161</sup> *Id.* The clerk implied that it was using the term "expungement" to cover both expungements and record-sealings. See E-mail from Luvada Wilson, Clerk of Courts, Erie Cty., to Nikki Trautman Baszynski (Feb. 19, 2020) (on file with the *Ohio State Law Journal*).

<sup>162</sup> See OHIO REV. CODE ANN. § 2953.32(C)(3) (West 2020).

<sup>163</sup> Wilson, *supra* note 161.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Criminal Division*, *supra* note 160.

<sup>167</sup> Wilson, *supra* note 161.

<sup>168</sup> *Criminal Division*, *supra* note 160.



### C. Fees Through Misrepresentation

#### 1. Arresting the Already Arrested

Michael Jones<sup>169</sup> was arrested, arraigned, and unable to post bail.<sup>170</sup> While he was incarcerated in the local jail, a warrant was issued for his arrest.<sup>171</sup> That warrant was seemingly impermissible: when a summons is “reasonably calculated to ensure the defendant’s appearance,” a summons must be issued instead of a warrant.<sup>172</sup> Because Mr. Jones was already in custody, a summons certainly would be reasonably calculated to ensure his appearance.<sup>173</sup> But, because a warrant was issued instead, Mr. Jones accrued a \$20 warrant fee rather than a \$6 summons fee.<sup>174</sup>

But the impermissible fees did not end there. The warrant was actually executed.<sup>175</sup> The return affirmed that the sheriff arrested Mr. Jones, gave him a copy of the warrant, and took him to the jail he was already in—which resulted in \$10 in alleged mileage fees.<sup>176</sup> In total, the sheriff’s arrest of a person who was already incarcerated increased the costs owed by Mr. Jones by \$30.<sup>177</sup> Those costs were later vacated.<sup>178</sup>

#### 2. False Mileage

The Jackson County Court of Common Pleas does not allow children in its courtrooms.<sup>179</sup> It makes this very clear—with very large, very bold lettering—on its notices for future hearings.<sup>180</sup> Intending to raise this as an error on appeal,

<sup>169</sup> Name has been changed.

<sup>170</sup> See Video Recording of Hearing on the Remanded Issue of Court Costs, State v. [redacted], [redacted] No. [redacted] ([redacted]) (on file with the *Ohio State Law Journal*) (discussion at 10:00–13:30).

<sup>171</sup> See *id.*

<sup>172</sup> OHIO R. CRIM. P. 4(A)(1) (“The issuing authority shall issue a summons instead of a warrant upon the request of the prosecuting attorney, or when issuance of a summons appears reasonably calculated to ensure the defendant’s appearance.”).

<sup>173</sup> See Video Recording of Hearing on the Remanded Issue of Court Costs, State v. [redacted], [redacted] No. [redacted] ([redacted]) (on file with the *Ohio State Law Journal*) (discussion at 10:20–13:30).

<sup>174</sup> See OHIO REV. CODE ANN. § 311.17(A)(5), (16) (West 2020).

<sup>175</sup> Return of Executed Warrant, State v. [redacted], [redacted] No. [redacted] ([redacted]) (on file with the *Ohio State Law Journal*).

<sup>176</sup> See *id.*

<sup>177</sup> See *id.*

<sup>178</sup> State v. [redacted], [redacted]-Ohio-[redacted], [redacted] N.E.3d [redacted], ¶ 24 ([redacted]) (on file with the *Ohio State Law Journal*); Journal Entry, State v. [redacted], [redacted] No. [redacted] ([redacted]) (on file with the *Ohio State Law Journal*).

<sup>179</sup> JACKSON CTY. MUN. CT. LOCAL RULE 3(D), <https://www.jacksoncountymunicipalcourt.com/pdf/rules-20150803.pdf> [<https://perma.cc/ZF2Z-BTA3>].

<sup>180</sup> State v. Tabor, 4th Dist. Jackson No. 16CA9, 2017-Ohio-8656, ¶ 3.

I examined every document in the trial record to see if the warning was issued on other case filings.

That review revealed another problem: the sheriff's department appeared to be charging mileage fees to deliver subpoenas to itself.

A sheriff can charge a fee for service of a subpoena.<sup>181</sup> The sheriff can also charge mileage fees for the service: "[T]wo dollars per mile for the first mile, and one dollar per mile for each additional mile, going and returning, actual mileage to be charged on each additional name."<sup>182</sup> The sheriff's office should not be permitted to charge mileage fees when it is delivering subpoenas to its own office.

But that was exactly what the Jackson County Sheriff's Department did. Though the subpoenas were addressed to officers of the department and the address for delivery was listed as the Sheriff's Office, documents showed that three subpoenas included mileage charges for this service.<sup>183</sup> The mileage charges varied, being listed as \$1.50, \$2.00, and \$10.50.<sup>184</sup>

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<sup>181</sup> OHIO REV. CODE ANN. § 311.17(A)(8) (West 2020) (stating the fee for service of a subpoena is ten dollars); *id.* § 311.17(A)(16) (stating the fee for service of summons, writs, orders, or notices is six dollars). The Ohio Rules of Procedure authorize sheriffs to serve subpoenas in both criminal and civil actions. OHIO R. CIV. P. 45(B); OHIO R. CRIM. P. 17(D). Whether subpoena fees are charged as \$10 under (A)(8) or \$6 under (A)(16) varies among courts, and there is no clear caselaw on which is the appropriate charge. *Compare* FRANKLIN CTY. CLERK OF COURTS, CIVIL FILING FEES & COSTS (2020), <https://clerk.franklincountyohio.gov/CLCT-website/media/Docs/general/civilFees.pdf> [<https://perma.cc/UCL4-9AWA>] (listing the charge for service of a subpoena as \$10), *with* Subpoena of Sergeant Ervin, State v. Tabor, Jackson C.P. No. 14CR0232 (Sept. 7, 2016) (listing the charge for service of a subpoena as \$6). It does appear that if one charges subpoenas under (A)(8), mileage might not be permitted. *See* OHIO REV. CODE ANN. § 311.17(B)(1) (West 2020). But, if subpoenas qualified under the "[a]ll summons, writs, orders, or notices" provision, mileage is permitted. *Id.*

<sup>182</sup> OHIO REV. CODE ANN. § 311.17(B)(1) (West 2020).

<sup>183</sup> Subpoena of Deputy Urias Hall, State v. Tabor, Jackson C.P. No. 14CR0232 (Sept. 7, 2016); Subpoena of Deputy McCarty, State v. Tabor, Jackson C.P. No. 14CR0232 (Sept. 7, 2016); Subpoena of Sergeant Ervin, State v. Tabor, Jackson C.P. No. 14CR0232 (Sept. 7, 2016).

<sup>184</sup> Subpoena of Deputy Urias Hall, State v. Tabor, Jackson C.P. No. 14CR0232 (Sept. 7, 2016); Subpoena of Deputy McCarty, State v. Tabor, Jackson C.P. No. 14CR0232 (Sept. 7, 2016); Subpoena of Sergeant Ervin, State v. Tabor, Jackson C.P. No. 14CR0232 (Sept. 7, 2016).

This error was also raised on appeal, but the court did not reach the merits.<sup>185</sup> It declined to conduct a plain-error review,<sup>186</sup> and further noted that the transmitted record was missing the subpoenas at issue.<sup>187</sup>

A similar challenge was raised in a Ross County appeal. There, the defendant argued that he was “improperly charged court costs for mileage fees associated with the Sheriff’s service of subpoenas on three officers at the Chillicothe Police Department, which is located in the same building as the Ross County Sheriff’s Office.”<sup>188</sup> The State conceded that the defendant “should not have been charged mileage for sheriff service of subpoenas to officers who are located in the same building as the Sheriff’s department.”<sup>189</sup> But, the appellate court declined to rule in the defendant’s favor, noting that the record did not contain anything “which affirmatively demonstrates that the Ross County Sheriff’s Department and the Chillicothe Police Department are housed in the same building” or that “indicates mileage in the amount of \$3.00 was charged for service of each subpoena.”<sup>190</sup>

#### D. Fees Through Mischaracterization

To apply for a public defender in Ohio, a person must fill out an affidavit of indigency and pay a \$25 application fee.<sup>191</sup>

Eliot Kalman<sup>192</sup> did not need to apply for a public defender. I had already been representing him for years, working to overturn his criminal trespass

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<sup>185</sup> *Tabor* ¶¶ 43–44.

<sup>186</sup> *Id.* The same appellate court later noted that because the cost bill was not received until after sentencing, and thus could not be objected to during the sentencing hearing, errors relating to the costs could properly be raised a direct appeal. *State v. [redacted], [redacted]-Ohio-[redacted], [redacted] N.E.3d [redacted], ¶¶ 24, 24 n. 3 ([redacted])* (citing *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, ¶ 39) (on file with the *Ohio State Law Journal*).

<sup>187</sup> *Tabor* ¶¶ 46, 46 n. 7. The subpoenas were in the record when I reviewed it; that was how I found them.

<sup>188</sup> *State v. Seymour*, 4th Dist. Ross No. 17CA3601, 2018-Ohio-1404, ¶ 14.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* ¶¶ 15–16.

<sup>191</sup> OHIO REV. CODE ANN. § 120.36(A)(1) (West 2020) (“[I]f a person who is a defendant in a criminal case or a party in a case in juvenile court requests or is provided a state public defender, a county or joint county public defender, or any other counsel appointed by the court, the court in which the criminal case is initially filed or the juvenile court, whichever is applicable, shall assess, unless the application fee is waived or reduced, a non-refundable application fee of twenty-five dollars.”).

<sup>192</sup> Mr. Kalman is an honorably discharged, disabled, Vietnam War combat veteran, who is also Jewish. His criminal prosecution related to his First Amendment protest of the Athens County Church Directory. E-mail from Kathleen Evans to Nikki Trautman Baszynski (Sept. 26, 2020) [hereinafter Evans’s E-mail] (on file with the *Ohio State Law Journal*); E-Mail from Eliot Kalman, Client, to Nikki Trautman Baszynski (Sept. 26, 2020) [hereinafter Kalman’s E-mail] (on file with the *Ohio State Law Journal*).

conviction.<sup>193</sup> By 2018, our realistic options to reverse the conviction were exhausted, the stay of his sentence was lifted, and costs became due. But the amount of assessed costs at that time was going to significantly burden Mr. Kalman. So, we filed a motion to waive them, which included exhibits that demonstrated his indigency.<sup>194</sup> The court set a hearing,<sup>195</sup> but after arguments, it declined to waive the costs. It did agree, however, to convert them into community service hours.<sup>196</sup>

We left the courtroom and went directly to the clerk's office to set up Mr. Kalman's community service.<sup>197</sup> He would receive \$7.25 in credit toward his court debt for every hour of community service he performed.<sup>198</sup> The clerk<sup>199</sup> announced that he owed \$289 in costs, so he would need to perform 40 hours of community service.<sup>200</sup> But, that amount—\$289—was different than the amount we had noted when we filed our motion.<sup>201</sup> What explained the increase?

The clerk pulled up the itemized bill, which showed that Mr. Kalman had recently submitted an application for appointment of counsel, which resulted in a \$25 fee.<sup>202</sup> I countered that Mr. Kalman did not need counsel appointed; I was here representing him. It must be a mistake.<sup>203</sup>

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<sup>193</sup> In 2014, Mr. Kalman was charged and acquitted of criminal mischief for placing "UNCONSTITUTIONAL" stickers on the church directory affixed to the Athens County Courthouse (the county could not prove who maintained the directory, failing to meet one of the elements of the crime). *State v. Kalman*, 2017-Ohio-7548, 84 N.E.3d 1088, ¶ 4 (4th Dist.). In 2015, Mr. Kalman returned to the courthouse to place more stickers on the directory. *Kalman* ¶¶ 6–9. This time, he was convicted of criminal trespass. *Id.* ¶ 20. Though Mr. Kalman lost his trial and appeal, the church directory was ultimately renamed "Directory" and now includes a variety of non-religious organizations. *Id.* ¶¶ 2, 20, 46–47; see also *Kalman Posts Sticker on Church Directory, Again*, ATHENS NEWS (Apr. 29, 2015), [https://www.athensnews.com/news/local/1092aulin-posts-sticker-on-church-directory-again/](https://www.athensnews.com/news/local/1092aulin-posts-sticker-on-church-directory-again/article_d6289442-4038-5ce6-9d7a-24f4dd594827.html) article\_d6289442-4038-5ce6-9d7a-24f4dd594827.html [https://perma.cc/B9V5-Q28S].

<sup>194</sup> Motion to Waive Court Costs, *State v. Kalman*, Athens M.C. No. 2015CRB02551 (June 21, 2018).

<sup>195</sup> June 25, 2018 Journal Entry, *State v. Kalman*, Athens M.C. No. 2015CRB02551 (June 25, 2018).

<sup>196</sup> July 11, 2018 Journal Entry, *State v. Kalman*, Athens M.C. No. 2015CRB02551 (July 11, 2018).

<sup>197</sup> See Evans's E-mail, *supra* note 192; Kalman's E-mail, *supra* note 192.

<sup>198</sup> See OHIO REV. CODE ANN. § 2947.23(D)(2) (West 2020) (explaining that the hourly credit rate must not be less than minimum wage).

<sup>199</sup> While the person who handled Mr. Kalman's cost bill and community service worked in the clerk's office, the person did not appear to be *the* clerk of courts for Athens.

<sup>200</sup> See Evans's E-mail, *supra* note 192; Kalman's E-mail, *supra* note 192.

<sup>201</sup> Motion to Waive Court Costs, *supra* note 194, at 3.

<sup>202</sup> See SE. OHIO LEGAL SERVS., GETTING INTO COURT AND USING THE COURT SYSTEM (Jan. 2018), <https://www.seols.org/wp-content/uploads/2018/02/Getting-into-Court-and-Using-the-Court-System.pdf> [https://perma.cc/9SNT-XQYN]; Evans's E-mail, *supra* note 192; Kalman's E-mail, *supra* note 192.

<sup>203</sup> This story has been verified by Kathleen Evans and Eliot Kalman. See Evans's E-mail, *supra* note 192; Kalman's E-mail, *supra* note 192.

No, the clerk forcefully replied; the application was filed, so he must be charged the fee.<sup>204</sup> I asked to see the recently filed application that resulted in the fee.<sup>205</sup> After some shuffling, the clerk returned with my motion.<sup>206</sup> I had attached to the motion Mr. Kalman's affidavit of indigency, which is used to prove that one qualifies for appointed counsel.<sup>207</sup> I explained to the clerk that the affidavit was not being used to apply for an attorney.<sup>208</sup> Instead, it was attached to my motion as an exhibit to demonstrate Mr. Kalman's financial status.<sup>209</sup>

This was initially unpersuasive: it was filed, so the fee would be assessed.<sup>210</sup> It took several rounds of discussion before the clerk agreed to remove the additional \$25 fee, reducing the total costs (and thus the needed community service hours) to the amount we had previously anticipated.<sup>211</sup> Mr. Kalman then asked whether he would be permitted to complete his community service hours at Southeastern Ohio Legal Services.<sup>212</sup> His request was emphatically denied.<sup>213</sup>

## VII. ANALYZING UNAUTHORIZED USE OF COSTS

Sometimes the costs are permissible, but the court's use or treatment of the debt is not.

### A. Conditioning Punishment on Court Costs

A Franklin County judge chose to condition the imposition of a fine on whether court costs were timely paid by the defendant.<sup>214</sup> The judge imposed both costs and a fine, but agreed to suspend the fine as long as the costs were

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<sup>204</sup> See *supra* note 203.

<sup>205</sup> See *supra* note 203.

<sup>206</sup> See *supra* note 203.

<sup>207</sup> See *supra* note 203.

<sup>208</sup> See *supra* note 203.

<sup>209</sup> See *supra* note 203.

<sup>210</sup> See *supra* note 203.

<sup>211</sup> See *supra* note 203.

<sup>212</sup> See *supra* note 203.

<sup>213</sup> See *supra* note 203. Shortly after the costs hearing, Mr. Kalman received word that his 99-year-old mother, a resident of Massachusetts, had taken grievously ill and required live-in care. Kalman's E-mail, *supra* note 192. Rather than further contesting the issue of where he would do his community service, Mr. Kalman raised and paid the entirety of his court debt so he could depart Ohio and provide the necessary care his mother needed. *Id.* Mr. Kalman's mother died in February of 2019, five weeks shy of her 100th birthday. *Pauline "Polly" (Olansky) Kalman*, BOSTON GLOBE (Feb 16, 2019), <https://www.legacy.com/obituaries/bostonglobe/obituary.aspx?n=1093auline-kalman-polly&pid=191572972> [<https://perma.cc/22R4-ZTP4>].

<sup>214</sup> Sentencing Entry at 1, *State v. [redacted]*, Franklin M.C. No. [redacted] (Aug. 27, 2020) (on file with the *Ohio State Law Journal*).

paid within a month of the conviction.<sup>215</sup> If the costs were not paid, the person would owe both the fine and the remaining court costs.

This practice is not only counterproductive (charging people more money when they have shown they cannot pay the amount they currently owe), but also unlawful.<sup>216</sup> Fines are different from costs in that they are considered a punishment.<sup>217</sup> Though financial in nature, they are in the same category as incarceration and community control.<sup>218</sup> Subjecting a person to criminal punishment because they were unable to pay their civil debt runs directly counter to clear Ohio Supreme Court precedent that forbids such a practice.<sup>219</sup>

The intermingling of fines and costs takes other forms in Franklin County. In a 2016 case, a docket entry noted “FINE AND COSTS OR 3 DAYS.”<sup>220</sup> The entry suggests that the defendant’s failure to pay their costs would result in future criminal punishment—this time, incarceration. Additionally, while a court could order someone to serve time in jail in lieu of fines, the court must first hold a hearing to determine whether the failure to pay was willful.<sup>221</sup> The court cannot simply create an either/or scenario where the incarceration is automatically imposed when someone fails to pay.<sup>222</sup> Further, a court should also not impose a sentence of incarceration when it has already signaled that such a harsh sentence is unnecessary by imposing a financial sanction instead.

### B. *Conditioning Dismissal of Charges on Court Costs*

Another Franklin County practice conditioned one’s criminal conviction on the payment of court costs. It worked like this: the defendant would be offered a dismissal of all charges if they agreed to complete a diversion program and pay all court costs by a certain date.<sup>223</sup> Of course, this sounds like an appealing resolution to a criminal case. But if the defendant was unable to pay the court costs by the set date, the court would reinstate the criminal charge and issue a warrant for the defendant’s arrest.<sup>224</sup>

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<sup>215</sup> *Id.* (showing a \$200 fine, all of which is suspended for “timely payment of court costs”).

<sup>216</sup> See OHIO REV. CODE ANN. § 2947.23(B) (West 2020) (explaining that a defendant’s failure to pay should result in community service rather than additional fines).

<sup>217</sup> *Strattman v. Studt*, 253 N.E.2d 749, 754 (Ohio 1969).

<sup>218</sup> See OHIO REV. CODE ANN. § 2929.01(E) (West 2020).

<sup>219</sup> *Strattman*, 253 N.E.2d at 754.

<sup>220</sup> Docket, *State v. [redacted]*, Franklin M.C. No. [redacted] (Nov. 14, 2016) (on file with the *Ohio State Law Journal*).

<sup>221</sup> OHIO REV. CODE ANN. § 2947.14 (West 2006); *State v. Ellis*, 2d Dist. Montgomery No. 22189, 2008-Ohio-2719, ¶¶ 13–23.

<sup>222</sup> *Ellis* ¶¶ 19–20.

<sup>223</sup> See, e.g., Renewed Motion to Dismiss Reinstated Charge at 3, *State v. [redacted]*, Franklin M.C. No. [redacted] (Apr. 16, 2018) (on file with the *Ohio State Law Journal*).

<sup>224</sup> *Id.* at 2.

This is what happened to John Reynolds.<sup>225</sup> Mr. Reynolds completed his diversion program, but he was unable to pay his court costs by the designated date. Legally, a failure to pay court costs could result in the amount being sent to collections.<sup>226</sup> Or a registration block could be issued.<sup>227</sup> Some courts just send a second bill as a reminder.<sup>228</sup> Instead, Mr. Reynolds' failure to pay resulted in revived criminal charges and an arrest warrant.<sup>229</sup>

We filed a motion to dismiss the reinstated charge.<sup>230</sup> In response, the city argued that contract law applied: defendants agree to pay costs, and the city agrees to dismiss the charges.<sup>231</sup> If the defendant does not live up to their end of the bargain, the city does not have to live up to theirs.

But criminal convictions should not be explicitly conditioned on the payment or nonpayment of money. The only difference between someone whose charges remained dismissed in Franklin County and someone who was subsequently convicted of them was the ability to pay the court an arbitrary amount of money.

After a couple of motions, the court granted Mr. Reynolds' motion to dismiss his reinstated charge.<sup>232</sup> And dismissals of criminal cases in Franklin County are no longer conditioned on the defendant's ability to pay.<sup>233</sup> Instead, the court should set a hearing and convert the court costs into community service hours, if necessary.<sup>234</sup>

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<sup>225</sup> Name has been changed.

<sup>226</sup> OHIO REV. CODE ANN. § 2929.18(F) (West 2020); OHIO REV. CODE ANN. § 2929.28(G)(1) (West 2020).

<sup>227</sup> OHIO REV. CODE ANN. § 1901.44(B) (West 2020); OHIO REV. CODE ANN. § 1907.25(B) (West 2020); OHIO REV. CODE ANN. § 2947.09(A) (West 2020).

<sup>228</sup> See, e.g., Docket, State v. [redacted], Jackson C.P. No. [redacted] (Sept. 20, 2018) (showing notices to pay costs sent on January 4, 2017 and September 24, 2018) (on file with the *Ohio State Law Journal*).

<sup>229</sup> Renewed Motion to Dismiss Reinstated Charge at 2, State v. [redacted], Franklin M.C. No. [redacted] (Apr. 16, 2018) (on file with the *Ohio State Law Journal*).

<sup>230</sup> *Id.* at 1.

<sup>231</sup> *Id.* at 6.

<sup>232</sup> Docket, State v. [redacted], Franklin M.C. No. [redacted] (Mar. 13, 2018) (on file with the *Ohio State Law Journal*).

<sup>233</sup> See E-mail from Melanie Tobias, Deputy Chief of Staff for Prosecution, Columbus City Attorney, to Nikki Trautman Baszynski (Sept. 4, 2020) (on file with the *Ohio State Law Journal*). The Deputy Chief of Staff for Prosecution explains that while they have no formal policy outlining this practice, prosecutors no longer seek to have charges reinstated for failure to pay and the court has agreed not to reinstate charges solely for failure to pay costs. *Id.*

<sup>234</sup> See OHIO REV. CODE ANN. § 2947.23(B) (West 2020) (explaining that a judge may allow a defendant to perform community service in order to satisfy court costs).

## VIII. CHALLENGING COSTS

*A. Defense Attorneys Have an Obligation to Review the Accuracy of Cost Bills and the Legitimacy of Charges*

Defendants are entitled to the effective assistance of counsel at all “critical stages.”<sup>235</sup> Sentencing is one of those critical stages.<sup>236</sup> Because court costs are imposed at the sentencing hearing and included in the defendant’s sentencing entry,<sup>237</sup> it should be an attorney’s responsibility to represent their client with respect to waiver and assessment of court debt. And the Supreme Court of Ohio recently held

[W]hen an indigent defendant makes an ineffective-assistance-of-counsel claim based upon counsel’s failure to request a waiver of court costs, a reviewing court must apply the test in *State v. Bradley* . . . which adopted the standard that had been announced in *Strickland*, for determining whether a defendant received ineffective assistance of counsel.<sup>238</sup>

Compared to the long-term harm of a criminal conviction and the inhumanity of incarceration, court costs may seem an insignificant concern. But they aren’t and shouldn’t be viewed as such. As defense attorneys, there is too often little we can do to keep our clients out of prison—the system is designed to secure convictions. And there may be little that we can do to shorten their sentences, particularly when the law requires mandatory or consecutive sentences. But by working to waive, reduce, or vacate court debt, we can try to make the time they spend in prison a little more bearable. And by seeking to vacate court costs that were illegally or fraudulently imposed, we can curtail abuses for not just our clients, but for other individuals subjected to the same government actors.

*B. Lingo v. State Outlines the Methods for Correcting Unauthorized Costs*

A Middleburg Heights police officer charged William Glick with weaving and operating a motor vehicle under the influence of alcohol.<sup>239</sup> The city offered

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<sup>235</sup> *Missouri v. Frye*, 566 U.S. 134, 140 (2012).

<sup>236</sup> *See Frye*, 566 U.S. at 145; *Mempa v. Rhay*, 389 U.S. 128, 137 (1967).

<sup>237</sup> *See, e.g., City of Middleburg Heights v. Quinones*, 120 Ohio St.3d 534, 2008-Ohio-6811, 900 N.E.2d 1005, ¶ 8; *State v. Gibson*, 8th Dist. Cuyahoga No. 104363, 2017-Ohio-102, ¶ 14; *In re Carter*, 4th Dist. Jackson Nos. 04CA15, 04CA16, 2004-Ohio-7285, ¶ 43.

<sup>238</sup> *State v. Davis*, 159 Ohio St.3d 31, 2020-Ohio-309, 146 N.E.3d 560, ¶ 1. A definitive ruling on whether trial counsel has a duty to provide effective assistance with respect to waiver of court costs has not been issued. *See id.* ¶ 6.

<sup>239</sup> *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, ¶ 4.



Mr. Glick a deal: plead guilty to reckless operation and pay a fine and court costs, and the weaving charge would be dismissed.<sup>240</sup>

Mr. Glick agreed to plead guilty and pay the fine and costs.<sup>241</sup> After his sentencing hearing, he was informed by the clerk's office that the total amount owed was \$960.<sup>242</sup> He paid that amount and received an itemized receipt: a \$450 fine, \$427 in costs related to the reckless-operation conviction, and \$83 in costs for the dismissed weaving charge.<sup>243</sup>

When Mr. Glick discovered that the Berea Municipal Court had charged him court costs on a dismissed criminal charge, he took action.<sup>244</sup> Joining Gregory Williams and Michael Lingo, Mr. Glick filed a complaint in the Cuyahoga County Court of Common Pleas on behalf of "all persons who had paid improperly calculated court costs in any Ohio municipal, county, or mayor's court . . . during the ten years prior to the filing of the complaint."<sup>245</sup> He sought class certification, a declaration that court costs could only be assessed once per case rather than once per charge, a refund of the improperly collected fees, and an injunction against the state forbidding any statutory court to collect court costs per offense in any case.<sup>246</sup> The trio also sought an order requiring the clerks to return all illegally assessed costs.<sup>247</sup>

Ultimately, each of their requests were denied.<sup>248</sup> Presented with the question of *how* defendants may challenge the assessment of unauthorized court costs, the Supreme Court of Ohio held that because costs are included in the defendant's sentencing entry, the only methods of attack are a direct appeal of that judgment or a postconviction motion in the same court.<sup>249</sup> A person cannot, as Mr. Glick did, seek assistance from a court that has no authority to vacate the judgments of another.<sup>250</sup>

### *C. The Issue Can Be Raised at Sentencing, by Motion, or on Direct Appeal*

#### *1. Sentencing*

Though a final itemized bill will often not be available at sentencing, attorneys may (and should) still seek a waiver of court costs by presenting evidence of their client's indigency and an estimation of the likely amount of

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* ¶ 7.

<sup>243</sup> *Id.* ¶¶ 5, 7.

<sup>244</sup> *Id.* ¶¶ 8–10.

<sup>245</sup> *Lingo* ¶ 9.

<sup>246</sup> *Id.* ¶ 11.

<sup>247</sup> *Id.* ¶ 37.

<sup>248</sup> *Id.* ¶ 24.

<sup>249</sup> *Id.* ¶ 45.

<sup>250</sup> *Id.* ¶ 49.

costs to be imposed. If costs are nevertheless assessed, attorneys may challenge costs that have already accrued (such as inaccurate mileage fees or unauthorized jury fees) during the sentencing hearing and seek a ruling then.

## 2. Section 2947.23(C) Motion

Under § 2947.23(C) of the Ohio Revised Code, a trial court retains continuing jurisdiction to vacate, modify, or suspend the payment of court costs.<sup>251</sup> If an appeal is not taken, has already concluded, or the record does not reflect the evidence of the error, a motion in the trial court to vacate the unauthorized costs can be used instead of seeking relief in the appellate courts.<sup>252</sup> This might also be the preferable route if a hearing is needed to establish why the costs are unauthorized. The Supreme Court of Ohio has affirmed that the statute permits motions to be filed in cases that occurred prior to its enactment, so anyone with outstanding court costs may apply for relief under this statute.<sup>253</sup>

## 3. Direct Appeal

In raising a costs issue on appeal,<sup>254</sup> appellants should keep in mind the following:

1. Seek a stay of the sentence, including the execution of costs.<sup>255</sup> This will avoid potential arguments regarding mootness and also ensure your client's court debt is not sent to collections before it can be reviewed.<sup>256</sup>
2. Get the cost bill. You can request it under § 2335.32 of the Ohio Revised Code.<sup>257</sup> The online docket is not enough.<sup>258</sup>

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<sup>251</sup> OHIO REV. CODE ANN. § 2947.23(C) (West 2020).

<sup>252</sup> *See id.*

<sup>253</sup> *State v. Braden*, 158 Ohio St.3d 462, 2019-Ohio-4204, 145 N.E.3d 235, ¶ 31.

<sup>254</sup> In order to appeal, the sentence must include more than court costs—a punishment must have also been imposed. *State v. White*, 156 Ohio St.3d 536, 2019-Ohio-1215, 130 N.E.3d 247, ¶ 32 (Kennedy, J., concurring in judgment only); Dan Trevas, *Court-Cost-Only Judgement Cannot Be Appealed*, COURT NEWS OHIO (Apr. 4, 2019), <http://www.courtnewsOhio.gov/cases/2019/SCO/0404/171292.asp#.XwVM8S2ZPyg> [<https://perma.cc/874D-49A6>].

<sup>255</sup> Following *State v. White*, if only costs are imposed, no appeal will be available and a motion will need to be filed instead. *See White* ¶ 32.

<sup>256</sup> *City of Columbiana v. Clark*, 7th Dist. Columbiana No. 11 CO 28, 2012-Ohio-4573, ¶ 2; *see* OHIO REV. CODE ANN. § 2929.18(F) (West 2006); OHIO REV. CODE ANN. § 2929.28(G)(1) (West 2020).

<sup>257</sup> OHIO REV. CODE ANN. § 2335.32 (West 2020).

<sup>258</sup> *See, e.g., State v. [redacted]*, 5th Dist. Muskingum No. [redacted], [redacted]-Ohio-[redacted], ¶¶ 40–41 (on file with the *Ohio State Law Journal*) (explaining that although the docket referenced charges it was “not evident from the docket alone that [the charges were

3. Cost bills are not regularly added to the record. Instead, a 9(E) motion to supplement the record will likely be needed.<sup>259</sup> Attach the cost bill you received to the motion as an exhibit. Once the motion is granted, ensure the clerk follows its orders.<sup>260</sup>
4. Though the clerk of courts prepares the itemized bill and collects the costs, any errors lie with the trial court. It is the trial court that imposed the costs and included them in the sentencing entry. Under *Lingo*, it is the trial court's order that must be modified.<sup>261</sup>

Ohio's appellate courts have taken various approaches regarding the applicable standard of review for unauthorized court costs. Some have held that because no objections to the costs were made in the trial court, plain error review is appropriate.<sup>262</sup> Others have reviewed the costs-related issues de novo.<sup>263</sup> Unless district precedent is abundantly clear, appellants should make arguments under both standards to ensure that they are properly preserved.

With respect to plain error, it is worth emphasizing why the assessment of unauthorized court costs affects a defendant's "substantial rights." Ohio's Criminal Rule 52(B) allows courts to correct "plain errors or defects affecting substantial rights."<sup>264</sup> To succeed on plain error review, an appellant must show 1) a deviation from a legal rule; 2) that the error is "plain" or obvious; and 3) that the error affected a "substantial right."<sup>265</sup> Even then, the appellate court must exercise "the utmost caution, under exceptional circumstances and *only* to prevent a manifest miscarriage of justice."<sup>266</sup>

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assessed] against appellant as court costs and we decline to speculate in the absence of the cited "Cost Bill").

<sup>259</sup> See OHIO R. APP. P. 9(E).

<sup>260</sup> Clerks of courts have failed to supplement the record with the cost bill, despite being ordered to do so. See, e.g., *State v. [redacted]*, 5th Dist. Muskingum No. [redacted], [redacted]-Ohio-[redacted], ¶¶ 40–41 (on file with the *Ohio State Law Journal*). Appellants should continually check the docket to make sure the clerk complied with the order and the record is actually supplemented before oral argument.

<sup>261</sup> *Id.* ¶ 25. An example of an assignment of error is: "The trial court assessed, and the clerk of courts collected, unauthorized court costs." *Id.*; see also *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, ¶¶ 34–37; BLACK'S LAW DICTIONARY 144 (Bryan A. Garner ed., 10th ed. 2014) (defining "unauthorized" as "done without authority").

<sup>262</sup> See, e.g., *State v. Thompson*, 3d Dist. Allen No. 1-19-30, 2020-Ohio-723, ¶ 18; *State v. Tabor*, 4th Dist. Jackson No. 16CA9, 2017-Ohio-8656, ¶ 45.

<sup>263</sup> See, e.g., *State v. Smith*, 12th Dist. Warren No. CA2010–06–057, 2011-Ohio-1188, ¶¶ 47–59; see also *State v. [redacted]*, [redacted]-Ohio-[redacted], [redacted] N.E.3d [redacted], ¶¶ 4, 20–26 ([redacted]) (applying plain error to imposition of fine, but not to imposition of court costs) (on file with the *Ohio State Law Journal*).

<sup>264</sup> OHIO R. CRIM. P. 52(B).

<sup>265</sup> *State v. Keith*, 684 N.E.2d 47, 54 (Ohio 1997); *State v. [redacted]*, [redacted]-Ohio-[redacted], [redacted] N.E.3d [redacted], ¶ 5 ([redacted]).

<sup>266</sup> *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 23 (quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, 1247 (2002)).

In *State v. Tabor*, the Fourth District Court of Appeals noted that it was “questionable whether any incorrect mileage charges would affect appellant’s ‘substantial rights.’”<sup>267</sup> In other words, the court questioned whether the government’s unauthorized taking of money from a person would affect that person’s substantial rights and constitute a manifest miscarriage of justice.

There are two problems with the treatment of unauthorized costs in this context. First, the government action at issue is plainly contrary to law.<sup>268</sup> The defendant is being forced to pay money to the government that it has no legal right to take.<sup>269</sup> Second, the case seems to imply that the amount at issue (\$14) was not substantial enough to affect substantial rights. This, too, requires pushback.

While \$14 may seem like an insubstantial amount to some, it can mean quite a bit to someone who is incarcerated in an Ohio prison. Persons confined within Ohio prisons who are given general work assignments earn only 10 to 17 cents per hour.<sup>270</sup> So, it would take an incarcerated person between 83 and 140 hours of prison labor to pay off that \$14 worth of unauthorized costs.<sup>271</sup> Illegally imposing court costs on someone, and potentially forcing them to perform several weeks’ worth of labor in order to satisfy that unlawful obligation is a manifest miscarriage of justice. Ignoring the fact that such practices effectively constitute stealing from criminal defendants undermines “public confidence in judicial proceedings.”<sup>272</sup> In short, illustrating the true impact of court costs is a necessary component of meaningful challenges to their unauthorized assessment and collection.

## IX. CONCLUSION

When it comes to court costs, there are plenty of rules but not enough people making sure they are followed. This lack of oversight, combined with considerable profit incentives, makes unauthorized court costs a predictable problem. And they are a problem that has gone largely unaddressed. But, as demonstrated above, unauthorized court costs can and should be challenged on many fronts. Defense attorneys can take up these issues in both the trial and appellate courts, and—because being vigilant against improper court costs is

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<sup>267</sup> *Tabor* ¶ 47; see also *State v. Taylor*, 2017-Ohio-4395, 93 N.E.3d 1, ¶ 17 (4th Dist.).

<sup>268</sup> See OHIO R. CRIM. P. 52(B); OHIO REV. CODE ANN. § 2947.23(C) (West 2006).

<sup>269</sup> See OHIO R. CRIM. P. 52(B); OHIO REV. CODE ANN. § 2947.23(C).

<sup>270</sup> Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL’Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [<https://perma.cc/D993-EQ7U>] (click “Show all states” to see Ohio rates). *But see id.* (explaining that those who are employed by Ohio Prison Industries can make between \$0.21 and \$1.23 per hour).

<sup>271</sup> It would take 82.35 hours making 17 cents an hour and 140 hours making 10 cents an hour to earn \$14.

<sup>272</sup> *State v. Tate*, 2d Dist. Montgomery No. 25386, 2013-Ohio-5167, ¶ 44 (citations and internal quotations omitted).

part of the effective assistance they are constitutionally required to provide their clients—they *must* do so.

Finally: if courts exist, they should be funded through taxes. Burdening defendants with court costs creates perverse incentives, is generally counterproductive to achieving improved circumstances and changed behaviors, and leads to much harsher consequences for those who are poor. We can illustrate the excessiveness and absurdity of court costs by paying much more attention to them, and we can ensure that their harm goes no further than the law permits by consistently and effectively monitoring their assessment and collection.

